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A

TREATISE

ON THE

LAW OF FIXTURES

BY

MARSHALL D. EWELL, LL. D.

SECOND EDITION

EDITED AND ANNOTATED

BY

FRANK HALL CHILDS, LL. B.

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CALLAGHAN & COMPANY
1905

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AUTHOR'S PREFACE

No treatise upon the subject of Fixtures professing to give anything like exhaustive references to the numerous cases on the subject in England and the United States having been published since the publication, in the year 1855, of the American edition of Ferard on Fixtures, no apology for the presentation of this volume to the profession is deemed necessary, in the preparation of which no labor has been spared to make the references to the adjudged cases upon the subject, both in England and the United States, as complete as the defective indexes to many of the volumes of reports of adjudged cases would permit. Since the publication of the work above referred to, cases upon the subject have multiplied to a considerable extent; and with the multiplication of the cases, the conflict of authority upon many questions (already sufficiently distressing to persons having occasion to examine the subject) has increased to such an extent that it is scarcely an exaggeration to state, as was observed by Bacon, J., in Noyes v. Terry,[1] that a judge might, in any given case, decide either way without much danger of having his judgment impeached, or of failing to find some authority to support it. Such being the case, the author has endeavored to deduce from the cases the principles of decision which seemed to him to be best supported by reason, as well as authority, and to present the same with references to the

[1] 1 Lans., 220 (1869). In referring to the same subject, Lynch, J., in *Re* Trevey, 14 L. T., N. S., 193 (1866), said: "Perhaps there are no subjects in law more difficult to deal with than the question raised as to fixtures and the several relationships of property that are allowed to influence decisions as to them. The cases are legion; and each new case seems only the more to disturb any fixed or certain rule that seemed deducible from former cases, and, indeed, on most questions on this subject, a court can easily give precedents that seem to uphold the doctrine it arrives at or is anxious to arrive at." See, also, chap. 1, Definitions. [See remarks of Justice Bakewell in Goodin v. Ellcardsville Hall Ass'n, 5 Mo. App., 289, 293 (1878).]

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authorities supporting them, at the same time referring in the notes to such cases in opposition thereto as came to his notice. The notes will also be found to contain quite full statements of such cases as seemed to merit the space thereby occupied; and, if the author has in some instances erred in judgment in his statement of principles (as it would be presumption for him to suppose that he has not), he has at least furnished the means of verifying his statements, and correcting any errors that may be found to exist.

The scope of the work involving the presentation of the whole law upon the subject so far as deducible from the English and American reports, it has not been deemed advisable entirely to omit even those portions of the English law upon the subject which have become either partially or entirely obsolete, been changed by statute, or which are inapplicable to this country. Such topics have accordingly been presented, and will, it is believed, be found of sufficient historical interest (if not, also, of some practical value) to warrant the small space thereby occupied. The general plan and method of classification adopted throughout the work are substantially the same as those adopted by Mr. Ferard and most other authors who have treated the subject, with which the profession have become familiar, and for changing which there seemed no sufficient reason. Several supplemental chapters and sections have, however, been rendered necessary by the changes effected by later cases, which have accordingly been inserted in what seemed their natural order.

In submitting this volume to the judgment of the profession, the author can not do better than to adopt the language of Bellewe in the preface to his volume of Cases temp. Richard II.:—

"Befeeching you that where you fhall finde any faultes, which either by my infufficiency, the intricatenes of the worke, or the Printer's recklefnes are committed, either friendly to pardon, or by fome meanes to admonifh me thereof."

MARSHALL D. EWELL.

CHICAGO, OCTOBER, 1876.

EDITOR'S PREFACE

TO THE SECOND EDITION

This edition has been prepared at the request of Dr. Ewell, with whom the editor has been associated for many years both in college and office work. About three thousand new cases have been added, bringing the subject down to date. The paging of the first edition is retained, all of the new matter appearing in brackets in the notes. Some of the new cases decide points which have already been settled, and such cases are merely cited in the proper place; yet many new points have been passed upon since the publication of the first edition, and those cases have been incorporated in the proper place. Citations to the National Reporter System, Lawyers' Reports Annotated, American Decisions, American Reports, American State Reports, etc., will be found in the Table of Cases.

Although the former edition was supposed to be practically exhaustive in the citation of cases, the editor has discovered a number of cases which were inadvertently omitted, and these have been included with the new cases.

The tendency of the courts is more and more towards liberality in regard to the right to remove fixtures, realizing as Lord Justice Lindley remarked in Hill v. Bullock [1897], 2 Ch., 483, that "there is such a thing as common sense" in determining whether a fixture is removable, though occasionally a court is found which laments the lack of a rigid rule to apply to every state of facts. The courts of the eastern states seek in every way to modify the hardship of their earlier decisions which were based upon the old common law decisions made when our ancestors held an exalted opinion of the importance of real property, and when the tendency was to concentrate landed interest in few hands; and even in conservative England decisions are now rendered which would have appalled the Justices of

half a century ago. The courts of our western states, not being so rigidly bound by the doctrine of *stare decisis,* are inclined to adopt a liberal rule when questions in regard to fixtures have come before them for the first time.

The editor has tried to do his work thoroughly and conscientiously, and hopes that his efforts may be of use to the profession.

FRANK HALL CHILDS.

CHICAGO, FEBRUARY, 1905.

PREFATORY NOTE BY THE AUTHOR.

This edition has been most carefully prepared by Mr. Childs under my direction; and I feel confident that it will be found to be both accurate and exhaustive.

MARSHALL D. EWELL.

CHICAGO, FEBRUARY, 1905.

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THE LAW OF FIXTURES

CHAPTER I.

DEFINITION AND NATURE OF FIXTURES.

I. Definitions.

There is, perhaps, no other legal term which has been used in so many differing and often contradictory significations as the the term "fixtures." This contrariety seems to have arisen from the different standpoints from which the subject has been viewed, with reference to the relation existing among the parties between whom the questions have arisen, the degree of annexation, the purpose for, and the intention with which such annexation has been made, the attributes of removability, irremovability, etc. Hence, there has arisen a variety of terms expressing more or less explicitly those differing relations, etc.; *e. g.*, tenant's fixtures, landlord's fixtures, removable and irremovable fixtures, trade fixtures, etc., subjects to be considered hereafter.

The term "fixtures," however, seems generally to have been used with reference to articles which, in and of themselves, and irrespective of annexation, real or constructive, to land, are of a chattel nature, and which have been either actually or constructively affixed either to the soil itself, or to some structure legally constituting a part thereof.

The term has often been used to denote such articles of a chattel nature, as, when once annexed to the realty, may not *be removed by the party annexing them, as against the [*2] owner of the freehold.[1]

[1] Hill Fixt., 13; Broom Leg. Max., 404. [Brown v. Baldwin, 121 Mo., 126, 134 (1893); Goodin v. Elleardsville Hall Ass'n, 5 Mo. App., 289, 293 (1878); Ritchie v. McAllister, 14 Pa. Co., 267, 269 (1894).] See the various uses of the term collected in Burrill's Law Dict., Fixture.

In the more general sense of the term, it means any annexation or addition which has been affixed to, or planted in, the soil of the land.[2]

[2] Per Kelly C. B., in Climie v. Wood, L. R. 3 Exch., 257, 260 (1868); s. c. 37 L. J. (N. S.), Exch., 158, 159; 18 L. T. (N. S.), 609, 610; L. R. 4 Exch., 328, on appeal. [Wolford v. Baxter, 33 Minn., 12, 17 (1884); Pronguey v. Gurney, 37 U. C. Q. B., 347, 353 (1875). See, also, Menger v. Ward, 28 S. W., 821, 823 (Tex. Civ. App., 1894).]

The expression "or in the nature of fixtures," has been declared to be too indefinite and vague for any practical purpose, as distinguished from fixtures. Stevens v. Buffalo, etc., R. R. Co., 31 Barb., 597 (1858).

In Sheen v. Rickie, 5 M. & W., 175, 181 (1839), which was trover for "certain goods, chattels and fixtures," after verdict for plaintiff it was objected, that it appeared on the face of the record that the action was brought for fixtures, for which trover could not be maintained. Parke B.: "If it had clearly appeared that the plaintiff meant to sue in respect of fixtures, properly so called—things affixed to the freehold—the declaration would be bad after this assessment of general damages; but after verdict, we ought to make every reasonable intendment in favor of the declaration; and it does not necessarily follow, that the word 'fixtures' must import things affixed to the freehold, nor has the word necessarily acquired that sense. It is a very modern word, and is generally understood to comprehend any article which a tenant has a power of removing, as appears from the case of Colegrave v. Dias Santos, 2 B. & C., 76; 3 D. & R., 255; but even this is not its necessary meaning; it only means something fixed to another; and every article enumerated in this declaration may be purely a movable chattel, and the fit subject of an action of trover." See, also, Brearley v. Cox, 24 N. J., 287 (1854); Wood v. Smith, Cro. Jac., 129 (1606). With reference to the case of Sheen v. Rickie, Chancellor Kent says (2 Com., 345, note (a): "But I apprehend that the ordinary meaning is the appropriate and legal meaning, and which is, *things fixed in a greater or less degree to the realty.*" See, also, 2 Smith's Lead. Cas., *239, English note, where it is said: "It seems better, therefore, for the purpose of this note, to use the word 'fixture' in that which appears to be its most natural and obvious sense, viz.: anything annexed to the freehold."

In Teaff v. Hewitt, 1 Ohio St., 511, 524; s. c., 1 Am. Law Reg. (O. S.), 723 (1853), per Bartley, C. J., it is said that "The term fixture itself, although always applied to articles of the nature of personal property which have been affixed to land, has been used with different significations, until it has become a term of ambiguous meaning. And this ambiguity which has attended the use of this word in various adjudications and by different writers, has been productive of much of the uncertainty which has perplexed investigations falling under this branch of the law. The term fixture has been used by various writers and in numerous reported decisions, as denoting personal chattels annexed to land, which may be severed and removed against the will of the owner of the freehold by the party who has

annexed them, or his personal representatives. Amos & Ferard on the Law of Fixtures, 2; Gibbon's Manual of the Law of Fixtures, 5; Grady's Law of Fixtures, 1; 2 Bouvier's Institutes of American Law, 162; 2 Kent Com., 344.

"There may be some propriety in this definition of the term when confined in its application to the relation of landlord and tenant, or tenant for life or years, and remainderman or reversioner, to which several of the elementary authors have chiefly confined their attention. But it does not appear to express the accurate meaning of the term in its general application. An article attached to the realty, but which is removable against the will of the owner of the land, has not lost the nature and incidents of chattel property. It is still movable property, passes to the executor, and not to the heir, on the death of the owner, and may be taken on execution and sold as other chattels, etc. A removable fixture as a term of general application, is a solecism—a contradiction in words. There does not appear to be any necessity or propriety in classifying movable articles, which may be for temporary purposes somewhat attached to the land, under any general denomination distinguishing them from the chattel property. A tree growing upon the soil, or any other article belonging to the freehold, may be converted into a chattel, by a severance from the land.

"It is an ancient maxim of the law that whatever becomes fixed to the realty, thereby becomes accessory to the freehold, and partakes of all its legal incidents and properties, and cannot be severed and removed without the consent of the owner. *Quidquid plantatur solo, solo cedit*, is the language of antiquity, in which the maxim has been expressed. The term fixture, in the ordinary signification, is expressive of the act of annexation, and denotes the change which has occurred in the nature and the legal incidents of the property; and it appears to be not only appropriate, but necessary, to distinguish this class of property from movable property, possessing the nature and incidents of chattels. It is in this sense that the term is used in far the greater part of the adjudicated cases. Co. Lit. 53 a, 4; 2 Smith's Leading Cases, 114; Chancellor Kent's note (a), 2 Kent's Com. 345; Dudley v. Ward, Ambl. 113; Elwes v. Maw, 3 East, 57. It is said that this rule has been greatly relaxed by exceptions to it, established in favor of trade, and also in favor of the tenant, as between landlord and tenant. And the attempt to establish the whole doctrine of fixtures upon these exceptions to the general rule, has occasioned much confusion and misunderstanding on this subject.

"Amos & Ferard, in their treatise on the law of fixtures, mention the division of the subject into removable and irremovable fixtures, and give a definition of each class. (See Amos & Ferard on Fixtures, p. 11). And they remark 'that it is difficult to determine in which of the above senses it is most frequently employed.' This classification of fixtures may be essential to a correct understanding of the double sense in which the term has been frequently used in the authorities; but it would not seem to be needed for any other purpose." * * * * "A fixture is an article which was a chattel, but which by being physically annexed or affixed to the

[*3] *Mr. Ferard, in his valuable work on Fixtures, uses the term "as denoting those personal chattels which have been annexed to land, and which may be afterwards severed and re-[*4] moved *by the party who has annexed them, or his personal representative, against the will of the owner of the freehold."[1]

This signification of the term does not comprehend all the relations in which the subject is usually considered, and will be considered in this volume, *e. g.*, with reference to annexations made by a stranger to the land of another without his consent. However, as the vast majority of questions arising in this branch of the law involve a consideration of the right of removal, as between the party making the annexation or his representatives, and the owner of the freehold, the term has been considerably used in this sense in the reports and by law writers.[2]

realty, became accessory to it, and part and parcel of it." [Davis v. Mugan, 56 Mo. App., 311, 316 (1893).]

[See *Ex parte* D'Eresby (1881), 44 L. T. R., 781, 782, where James, L. J., in his opinion, makes a distinction between a "thing fixed" and a "fixture," because the latter is an ambiguous word which supposes it to be something to which the tenant has a right, and not something fixed and belonging to the freehold.]

[1] Ferard Fixt., 2. [State v. Marshall, 4 Mo. App., 29, 32 (1877).] " 'Fixture' is a term in general, denoting the very reverse of the name." 1 Chit. Gen. Pr., 161. In Van Ness v. Pacard, 2 Pet., 137, 147 (1829), Story, J., uses the term in a directly contrary sense, as denoting articles which may not be so removed. However, on pages 143, 145, 146, 148, he uses the term to denote articles that may be removed.

[2] This signification of the term has been adopted and approved in the following cases and text-books: Hallen v. Runder, 9 Tyr., 959 (1834); s. c. 1 Cr. M. & R., 266; 3 L. J. (N. S.) Exch., 260; *Ex parte* Reynal, 2 M. D. & De G., 443, 448 (1841); Sheen v. Rickie, 5 M. & W., 175 (1839); Turner v. Cameron, L. R. 5 Q. B. 306, 311 (1870); s. c. 39 L. J., Q. B., 125; 22 L. T. (N. S.), 525; 18 W. R., 544; 9 B. & S., 931; Parsons v. Hind, 14 W. R. 861 (1866); Beardsley v. Ontario Bank, 31 Barb., 619, 629 (1859); Coddington v. Beebe, 29 N. J. 550, 558 (1862); Rogers v. Gilinger, 30 Penn. St., 185, 189 (1858); Pickerell v. Carson, 8 Iowa, 544 (1859); Prescott v. Wells, 3 Nev., 82, 89 (1867); Broom Leg. Max., 404; Grady Fixt., 1; Gibb Fixt., 5; Brown Fixt., 1; Bouv. Law Dict., Fixture. See, also, Climie v. Wood, L. R., 3 Exch., 259, 260 (1868); s. c. 4 Id. 328; Gibson v. Hammersmith Railway Co., 11 W. R., 299 (1863); Burrill Law Dict., Fixture. [Choate v. Kimball, 56 Ark., 55, 60 (1892); Harkey v. Cain, 69 Texas, 146, 150 (1887); *Re* De Falbe, [1901], 1 Ch., 523, 538; Brown v. Herriot,

*With reference to the objections to the use of the term [*5] in this sense, that "an article attached to the realty, but which is removable against the will of the owner of the land, has not lost the nature and incidents of chattel property," and that "a removable fixture as a term of general application, is a solecism —a contradiction in words," it may be observed that, if the term is applied solely to articles once chattels, but which by being physically annexed or affixed to real estate, have become a part of and accessory to the freehold, the property of the owner of the land, and which may not be severed and removed by the party who annexed them, without the permission of the owner of the land, there seems to be no need of any distinct legal term to designate them, as they at once become parcel of the realty, and subject to all the rules of law governing real estate in general, and stand in no more need of a separate nomenclature than turf, gravel, growing trees, or other parts of the realty. And though removable fixtures retain to some extent some of the attributes and incidents of chattels, in other respects, during such annexation, they to some extent retain some of the incidents of realty, and it is precisely because of their mixed nature, partaking in part of the nature of realty and in part of that of personalty, that a distinct term may properly be used to distinguish such articles, on one hand from property possessing all the attributes of realty, and on the other hand from mere chattels.

As to the contradiction in words involved in the use of the

1 Kyshe (Straits Set.), 43, 51 (1842). See, also, Freeman v. Lynch, 8 Nebr., 192, 199 (1879).]

In Wall v. Hinds, 4 Gray, 270 (1855), it is said that " 'tenant's fixtures,' in its strict legal definition, is to be understood to signify things which are fixed to the freehold of the demised premises, but which, nevertheless, the tenant is allowed to disannex and take away, provided he seasonably exerts his right to do so."

In *Ex parte* Barclay, 5 De G. M. & G., 403, 410 (1855); s. c. 1 Jur. (N. S.) 1145; 25 L. J., Bankr., 1; 35 Eng. L. & Eq., 169, Ld Chancellor Cranworth and the Lords Justices, define fixtures to be "such things as are ordinarily affixed to the freehold for the convenience of the occupier, and which may be removed without material injury to the freehold"; and he adds, "such things when put or fixed by the tenant, may, on certain conditions, be removed by him without giving any ground of complaint to the landlord."

terms "removable fixtures," it may be observed that the word "fixture" necessarily means only something fixed or attached to another, as distinguished from a movable,—a status of fixation or annexation, and does not seem to imply that such annexation is not severable.[1]

[*6] *Were the subject *res integra,* it would seem more logical and more in accordance with correct usage and the signification of the term, that the ordinary meaning should be the appropriate and legal meaning, viz.: things fixed in a greater or less degree to the realty.[2] And in this work, except as otherwise indicated in the course thereof, the term will be used to designate things originally chattel in their nature, which are so fixed or annexed, either actually or constructively, to the realty, as to have lost, either wholly or to some extent, and for some purposes, while so annexed, their character as movable chattels.[3] The term has, however, within the limits above defined been used so loosely and in so many different significations by various writers,[4] that it is deemed expedient, in order to render the

[1] With reference to the meaning of the term "fixtures," see, also, Ferard Fixt. 11, where it is said: "From the observations that have been offered in the preceding pages, the reader will probably be of opinion that the use of the term 'fixtures,' in the sense in which it is adopted in the definition, is attended with some convenience; inasmuch as it serves to distinguish a species of things which are subject to a very peculiar right of property, and which manifestly require some appropriate appellation. Indeed, the application of the term indiscriminately to all chattels affixed to land, serves to point out their physical character only, and has no reference to any legal rights that may attach to them. And with respect to its application to those things which cannot legally be removed after annexation, there appears to be the less necessity for giving a name to them, because the right of property in these cases is precisely of the same nature as that which is exercised over every part of the freehold. It should, however, be observed that the term 'fixtures' has been used by the courts, and amongst the text writers without much precision; and it is difficult to determine in which of the above senses it is most frequently employed." [McCall v. Walter, 71 Ga., 287, 290 (1883); St. Louis Radiator Co. v. Carroll, 72 Mo. App., 315, 319 (1897); Argles v. McMath, 26 Ont., 224, 235 (1895).]

[2] See 2 Kent Com. 345, note (a); Climie v. Wood, L. R. 3 Exch., 257, 260 (1868), per Kelly, C. B., s. c. on appeal L. R. 4 Exch., 328; [Bain v. Brand (1876), 1 App. Cas., 762, 772].

[3] See Teaff v. Hewitt, 1 Ohio St., 511, 525 (1853); Edwards v. Derrickson, 28 N. J. Law, 56 (1859).

[4] See the various uses of the term in Burrill Law Dict. Fixture.

author's meaning more apparent, in all cases where the use of the simple term "fixture" would be ambiguous, to use in connection therewith the qualifying words "removable," "irremovable," or other words of equivalent import.

The terms "fixtures," "fixed furniture," and other similar expressions, are often made use of by testators, parties to contracts, and in other connections, and have sometimes come before the courts for interpretation. In such cases the meaning of the terms is sometimes different from the ordinary signifi-*cation of the term "fixtures," and in each case it is to be [*7] determined according to the usual rules of interpretation and construction.[5]

[5] See the general rules of interpretation and construction, well collected in Blackwell on Tax Titles, *595, *et seq.*

The cases under this head, not all seeming susceptible of a more regular classification under the ordinary topics of the law of fixtures, are, except so far as they serve to illustrate subjects to be considered farther on, presented in this note.

Fixed Furniture, etc.—A testator by his will devised his house, with the grates, stoves, coppers, etc., and the "fixtures and fixed furniture," to his executors upon trust, to permit E. S. V. to have the use thereof for her life; he also bequeathed his furniture, plate, etc., and other properties not being comprehended under the term "fixtures and fixed furniture" in trust for E. S. V., absolutely. There were in the messuage looking-glasses standing on chimney-pieces, and fastened by nails on each side to the wall, and a book-case standing on, but not fastened to, brackets, and fastened above by a screw to the wall: *Held*, that these were included in the term "fixed furniture," a distinction being made in the will between fixtures and fixed furniture. Lord Denman, C. J.: "The will mentions three classes of articles: fixtures, fixed furniture, and furniture not fixed. We must see what will answer to each of those three classes. Bells and other fixtures constitute the first. The articles which may be removed by the hand at once, constitute the third. The intermediate class is furniture which is fixed, and that appears to me to comprehend the articles in question." Birch v. Dawson, 6 C. & P. 658 (1834); s. c., 2 Ad. & E., 37. [See, *post*, p. *314. A conveyance of "fixtures, of every description, attached to said buildings, in said buildings and belonging to the same" does not indicate two classes of fixtures, one attached and the other not attached, but only one class, and does not cover desks, chairs, trucks, show-cases and the like. Stettauer v. Hamlin, 97 Ill., 312, 319 (1881). Where a catalogue of articles to be sold at auction enumerated gasfittings, Venetian blinds, fire escapes, coat hooks and beer engines along with a great number of movable articles without distinction, a purchaser at private sale of "all and singular, the

stock and furniture'' intended to be sold, acquires the fixtures. Daly v. Marshall, 4 N. Z. L. R. (Supr. Ct.), 28 (1885).]

[*Store Fixtures.*—These are store fittings or fixed furnitures, which are peculiarly adapted to make a room a store rather than something else, such as shelving, counters, etc., and an exception thereof in an insurance policy does not include fixtures in a factory; while ''store or other fixtures'' would include the fixtures of a factory. Thurston v. Union Ins. Co., 17 Fed., 127, 129 (U. S. C. C., N. Ham., 1883); Commercial Ins. Co. v. Allen, 80 Ala., 571, 578 (1886); Sawyer v. Long, 86 Maine, 541 (1894).]

The words ''*fixtures and appurtenances,*'' have acquired a peculiar and appropriate meaning, and are to be construed according to such meaning, having due reference to the context, and to the connection in which the words are used; and where a bill of sale, purported to sell and convey ''all fixtures and appurtenances contained in the daguerreian rooms on Main Street, Dubuque, belonging to said F. M. P.,'' there being no schedule of the property attached thereto, it was *held,* that ''appurtenances'' embraced all such property as pertained or belonged to the room, or as remained there permanently, and was used in carrying on the daguerreian business, such as maps and pictures hanging on the wall, stove and carpet, apparatus and furniture, machines and stock, and all things used in carrying on the business—the term ''fixtures'' being satisfied by the sky-light, balcony, partition, etc., admitted to be fixtures. Pickerell v. Carson, 8 Iowa, 544 (1859). [See *post,* p. *166. In Lewis v. Rosler, 16 W. Va., 333, 342 (1880), ''appurtenances'' was *held,* in an order appointing a receiver for real estate, to include fixtures which had been severed to prevent their loss or misappropriation.]

[*Fixtures and Fittings.*—A lease provided that ''fixtures and fittings'' were to remain the property of the landlord. *Held,* that a bar, bar-shelves, oyster-counter, gaseliers, gas-brackets and other gas fixtures came under this designation, as those attached by nails and screws were fixtures, and the term ''fittings'' applied to objects necessary to fit the premises for their special destination, *e. g.,* the bar and counters in a bar-room. *Re* Duperrouzel, 9 Leg. News (Montreal), 380. (Super. Ct., 1886).]

Work Done and Fixed.—In Tripp v. Armitage, 4 M. & W., 687 (1839); S. C., 8 L. J. (N. S.), Exch., 107, B., a builder, contracted with A. to build a hotel for a specified sum, to complete certain portions within specified times, being paid by instalments at corresponding dates. The agreement contained a clause empowering A., in case B. should become bankrupt, to take possession of the work already done, and to avoid the agreement, and that A. should in such case pay B. or his assignees only so much as A.'s architect should adjudge to be the value of the work actually done and fixed. No articles were received in the course of the business till inspected and approved by the clerk of the works. B., pending the work, became bankrupt. Before his bankruptcy, certain wooden sashes were delivered by him on A.'s premises, approved by the clerk and returned to B. to have pulleys of B. affixed, and at the time of the bankruptcy were with pulleys attached in B.'s shop, but were afterwards, before the issuing of the fiat, redelivered to A.,

who subsequently, on the sash and frames being demanded by the assignees, unqualifiedly refused to deliver them up: *Held,* that this was not a contract to purchase goods at all, but a contract for work to be done; that A. was not bound to pay for anything till put up and fixed, and therefore the property remained in B. and passed to his assignees, notwithstanding the sash had been approved by A. See Shell v. Haywood, 16 Penn. St., 523 (1851); Johnson v. Hunt, 11 Wend., 135 (1834).

[*Erected upon or Affixed to the Land.*—This clause includes depot buildings resting upon columns. People v. Commissioners of Texas, 26 Supr. Ct., N. Y. (19 Hun), 460, 461 (1879). Where a lessee has undertaken "not to affix or permit any outward mark or show of business to be affixed" on the demised premises, and a firm name appears upon a wire blind, although removable, also upon a white roller blind, and upon a brass plate attached to railings at the entrance, each constitutes a breach of the covenant. Evans v. Davis (1878), 10 Ch. D., 747.]

[*Fixed and Attached.*—For the meaning of these words in 17 & 18 Vict., c. 91, sec. 42, see Dundee v. Carmichael (1902), 4 Sess. Cas., 5th Ser., 525.]

[*Upon and Over.*—Where the plaintiff alleged the unlawful erection by the defendant of a partition "upon and over" the plaintiff's land, and the evidence showed that such partition was fastened to the defendant's building, but standing slightly upon the plaintiff's side of the line, it was *held* that the probata corresponded substantially with the allegata. Hennessy v. Anstock, 19 Pa. Super., 644 (1902).]

Fixtures and Articles in the nature of Fixtures.—Meaning of the clause, in a covenant to deliver up at the end of the term the demised premises, "together with all locks, keys, bars, bolts, marble and other chimney-pieces, foot-paces, slabs and other fixtures, and articles in the nature of fixtures, which should at any time during the term be fixed or fastened to the said demised premises." See Bishop v. Elliott, 11 Exch., 113 (1855); s. c. 1 Jur. (N. S.), 962; 24 L. J. (N. S.), Exch., 229; and *post,* *149, under the head of the right of removing fixtures, as affected by special agreements in relation thereto. See, also, Stevens v. Buffalo, etc., R. R. Co., 31 Barb., 597 (1858), where the expression "or in the nature of fixtures" was considered to be too indefinite and vague for any practical purpose, as distinguished from fixtures.

Improvements.—As between lessor and lessee the word "improvements" has a more comprehensive meaning than "fixtures," and includes the latter. See French v. The Mayor, 16 How. Pr., 220 (1858); s. c. 29 Barb., 363; West v. Blakeway, 2 M. & G., 729 (1841); Haslett v. Burt, 18 C. B., 893 (1856); Merritt v. Judd, 14 Cal., 59 (1859). [Ames v. Trenton Brewing Co., 56 N. J. Eq., 309, 316 (1897), aff'd in 57 N. J. Eq., 347 (1898); Parker v. Wulstein, 48 N. J. Eq., 94, 96 (1891); Hopkins v. Gilman, 47 Wis., 581 (1879).] See, also, Hasty v. Wheeler, 12 Me., 434 (1835); [Smusch v. Kohn, 49 N. Y. Supp., 176, 178 (1898); Wait v. Jameson, 15 Abbott's New Cas., 382 (N. Y., 1883); Smith v. Detroit Min. Co., 97 N. W., 17, 19 (S. Dak., 1903); London & S. African Co. v. DeBeers Mines [1895], A. C. 451; Byrnes v. Macarthur, 2 N. S. W. L. R., 57

(1881). "Improvements" in a mortgage will not cover a greenhouse not attached to the land in such a manner as to become a part thereof. Royce v. Latshaw, 15 Colo. App., 420, 425 (1900). A stepping-stone and two ornamental vases do not pass under a mortgage of land with the "improvements thereon erected." Pfluger v. Carmichael, 54 App. Div., 153, 155 (N. Y., 1900). Balusters, railings, chairs, scenery and the rollers and pulleys for shifting the same, in a theater, are "fixtures and improvements" within the mechanics' lien law. Grewar v. Alloway, 3 Tenn. Ch., 584, 585 (1877)]. Also the right of removal as affected by contract, considered *post*, in the chapter on Landlord and Tenant, p. *149.

See, also, as to the term "*erections*," Bidder v. Trinidad Petroleum Co., 17 W. R., 153 (1868); Holbrook v. Chamberlin, 116 Mass., 155 (1874); Esterley's Appeal, 54 Penn. St., 192 (1867). [See, *post*, p. *166. See, also, Adamson v. Rogers, 22 Ont. App., 415 (1895). A dock is a "fixture" or "erection" within a statute prohibiting the laying out of roads through fixtures or erections used for the purposes of trade. Flanders v. Wood, 24 Wis., 572, 576 (1869).]

Addition.—A porch or piazza is an addition within the 5th Section of the N. J. Mechanics' Lien Law (Nix. Dig., 487), providing that, "any addition erected to a former building, and any fixed machinery or gearing, or other fixtures for manufacturing purposes shall be considered a building for the purpose of this act." But folding doors are not an addition, but an alteration merely. Whitenack v. Noe, 11 N. J. Eq., 413 (1857). See, also, Whitwell v. Harris, 106 Mass., 532 (1871), as to the terms "alteration or addition." [See, *post*, p. *166. See, also, Williams v. Cornwall, 32 Ont., 255, 258 (1900); Ames v. Trenton Brewing Co., 56 N. J. Eq., 309, 316 (1897); *Re* Gaskell's Set. Est. [1894], 1 Ch., 485. A new foundation for a new engine is an addition, and not repairs. Dunnell v. Henderson, 23 N. J. Eq., 174, 178 (1872). A steam heating plant which is so attached to a public building as to become a part of it, is "an addition to a building" within a statute requiring a contract therefor to be let to the lowest bidder. State v. Crawford County, 17 Ohio C. C., 370, 375 (1899). Likewise, a passenger elevator is an addition to or alteration of a courthouse within Sec. 798, Rev. Stat., which requires advertisement for proposals, although an elevator shaft was constructed several years previously. State v. Butler County, 10 Ohio Circ. Dec., 118 (1879). New machinery for an old mill, removable at pleasure, is not a "repair, alteration of, or addition" within the mechanics' lien law. Haslett v. Gillespie, 95 Pa. St., 371, 375 (1880). A mechanics' lien was claimed for "the erection, construction and improvement and fitting up" of buildings, and related to an additional furnace for a steel works already in operation. The statute did not provide for "improvements." *Held*, that the furnace did not come within the description, and that "improvement" was not equivalent to "repairs, alterations or additions." Wetmore's App., 91 Pa. St., 276, 278 (1879). A heating apparatus in a mansion-house is not an "addition" within the Settled Land Act, and the expense thereof must be borne by the life-tenant. *Re* Gaskell's Set. Est., [1894], 1 Ch., 485.

Likewise an electric light plant. *Re* Blagrave's Set. Est. [1903], 1 Ch., 560. *Re* Clarke's Set. [1902], 2 Ch., 327. But see *Re* Freake's Set. [1902], 1 Ch., 97, 99. A large clock bolted to the front wall of leased premises is not a violation of a covenant not to make any "alteration." Bickmore v. Dummer [1902], 72 L. J., Ch. 96.]

Building.—A new wing or addition to a building, using the wall of the old building for the fourth wall of the addition, is a building within the meaning of the Mechanics' Lien Law. Harman v. Cummings, 43 Penn. St., 322 (1862). [But an addition is not a building within a statutory restriction upon uniting buildings. Scott v. Legg (1877), 46 L. J. M. C., 267, reversing (1876) 46 L. J. M. C., 117. A bay window is a building within a restriction. Manners v. Johnson (1875), 1 Ch. D., 673. Likewise a piazza. Reardon v. Murphy, 163 Mass., 501 (1895); Bagnall v. Davies, 140 Mass., 76 (1885); Ogontz Land Co. v. Johnson, 168 Pa. St., 178 (1895), reversing 14 Pa. Co., 86 (1893). *Contra,* Hawes v. Favor, 161 Ill., 440, 449 (1896). A piazza is not a building within the mechanics' lien law. Tench v. Rothermel, 4 Luz. Leg. Reg. R., 110 (1886). A cow-stable, wagon-shed and chicken-house are "buildings and fixtures" within a statute forbidding laying out a highway through the same without the consent of the owner. Smart v. Hart, 75 Wis., 471, 473 (1890). A covered way to protect frescoes upon a churchyard wall, is not a "building" such as is prohibited by the Disused Burial Grounds Act, 1884, and the Open Spaces Act, 1887. St. Botolph, Aldersgate Without v. Parishioners [1900], P., 69. The foundation walls of an incomplete building are superstructures within the mechanics' lien law, though lowered into the earth, and are just as much a part of the building as its upper story or roof is. Baker v. Waldron, 92 Maine, 17, 21 (1898). "Buildings and improvements" in a lease include machinery annexed. Peet v. Dakota Ins. Co., 7 S. Dak., 410, 421 (1895). That a building is not necessarily a fixture, see Williamson v. State, 39 Tex. Crim., 60, 61 (1898); Favro v. State, 39 Tex. Crim., 452 (1898). See, also, *post* p. *166.]

Factories.—A covenant to keep factories insured, embraces in its obligation the fixed machinery necessary to operate them, among which are the water wheel, shafting and gearing; because, "without such necessary machinery the buildings would not in fact be factories. A building is no more a factory without machinery, than machinery would be a factory without a building." Mayhew v. Hardesty, 8 Md., 479 (1855); [Vilas v. McDonough Mfg. Co., 91 Wis., 607, 612 (1895). See, also, *post,* p. *308].

[*Fixed Machinery.*—For the meaning of this term in the mechanics' lien law, see Campbell v. Taylor Mfg. Co., 64 N. J. Eq., 344, 346 (1902); Campbell v. John W. Taylor Co., 62 N. J. Eq., 307 (1901); Griggs v. Stone, 51 N. J. Law, 549, 552 (1889). "Machinery fixed or attached" in a statute relating to assessment of leased premises, means such as cannot be detached without destruction to itself or injury to the building, such as would go to the landlord at the termination of the lease. North British R'y Co. v. Assessor (1887), 25 Scot. Law Rep., 4. By the conditions of a sale of a brewery, the grantee was to pay for the "fixed plant" accord-

ing to a valuation to be made. *Held*, that "plant" was dead stock, which did not act, but was that through, and by means of, and in which, action took place, as pipes, vats, etc., but did not include a chimney-shaft, a partition, nor staging. *Re* Nutley, 96 Law Times, 585 (Ch., 1894).]

Lands, Tenements and Hereditaments.—Where the plaintiff, being the owner of a woolen mill and a steam engine therein, let to the defendant a room in the mill, together with a supply of power from the engine by means of a shaft revolving in the room, the amount of rent to be regulated by the amount of machinery the defendant should from time to time introduce and require to be worked in the mill: *Held*, in an action on the statute 4 Geo. 2, c. 28, for the recovery of double the annual value (the statute giving double value for "lands, tenements and hereditaments"), against the tenant for holding over after the expiration of notice to quit, that in estimating such double value the power supplied could not be included, the compensation being jointly for the use of the tenement and its appurtenances, and for the landlord's performance of a contract to do something beneficial to the occupier. Robinson v. Learoyd, 7 M. & W., 48 (1840). [Where different rates were to be assessed for "lands" and for "houses and buildings," and certain warehouses and wharves were useless unless worked together, such warehouses and wharves were properly assessed as "buildings"; but a detached dry-dock must be assessed as "land." Tanjong Co. v. Commissioners, 4 Kyshe, 103 (Straits Set., 1885).]

[*Yard Fixtures.*—An insurance policy excluded from its operation "yard fixtures" and "store furniture and fixtures." *Held*, that shelving, drawers, and an office in the store, were "store fixtures," but that a wooden awning in front was neither a "yard fixture" nor a "store fixture." Commercial Ins. Co. v. Allen, 80 Ala., 571, 578 (1886).]

[*Fixed Engine.*—Where a statute provided a penalty for using a "fixed engine" for catching fish, and defined it as any implement, device or contrivance fixed to the soil or partly stationary in any way or manner," *quaere*, whether lines, some fastened to rods stuck into the ground, others to logs or trees, or to sticks driven into the ground, were "fixed engines." Steele v. Osboldstone, 16 Austr. Law T., 152 (1895).]

As to the distinction between "*repairs*" and "*fixtures*," see Mason v. Fenn., 13 Ill., 525 (1852).

Movable Articles—Construed to mean articles removable by the tenant, notwithstanding they had been affixed to buildings, in Sumner v. Bromilow, 11 Jur. (N. S.), 481, 484 (1865); s. c., 34 L. J. (N. S.), Q. B., 130. See *post*, chap. [4, p. *171, n. The word "goods" in the chattel mortgage act, §4913, means all kinds of personal property, and includes fixtures. St. Joseph Co. v. Wilson, 133 Ind., 465, 472 (1892). A conveyance of land contained a covenant that "no * * * chattel shall be erected, made, placed or be allowed to remain upon any lot." *Held*, that a "switchback" railway resting upon piles driven into the ground, was a "chattel" and not a fixture, and was a violation of the restriction. Chamberlayne v. Collins, 9 Repts., 311, (Eng., 1894). A chattel mortgage of "personal property"

*II. Tests as to whether a Fixture or not; Annexation, etc. [*8]

The term "fixture" is not predicable of anything which is not susceptible of physical annexation. Thus, the name "What Cheer House," used by a tenant to designate a building used *by him as a hotel, is not such a fixture that the landlord [*9] or his vendee of the premises, on the tenant's surrendering the same, has a right to the continued use of the name to designate that hotel; but the said name is a trade-mark, to the use of which the tenant has the exclusive right, and in the exercise of which he will be protected by injunction.[1]

As to what are the tests by which to determine whether an article is a fixture or a mere chattel, there have been hitherto, and still are, great confusion and contradiction among the au-

will not create a lien upon buildings not removed and removable only. Sampson v. Camperdown Mills, 64 Fed., 939, 942 (U. S. C. C., S. Car., 1894). Where a chattel mortgage is given upon "my stock and fixtures in the store now occupied" by the mortgagor as a tenant, the word "fixtures" means chattels of a permanent nature in contradistinction from those kept for sale, such as were incident to the convenient use of the store. Sawyer v. Long, 86 Maine, 541 (1894). As to the meaning of "fixtures" when excepted in a policy of insurance, see Thurston v. Union Ins. Co., 17 Fed., 127, 128 (U. S. C. C., N. Ham., 1883). Mechanics' lien not allowed for a hedge as "fixtures." Eastern Ark. Fence Co. v. Tanner, 67 Ark., 156, 158 (1899). See, also, as to flowers, shrubs and trees, Nanz v. Park Co., 103 Tenn., 299 (1899).]

[1] Woodman v. Lazar, 21 Cal., 448 (1863). See, also, Robinson v. Learoyd, 7 M. & W., 48 (1840); [Dewitt v. Mathey, 18 Ky. Law R., 257 (1896). See, also, Vonderbank v. Schmidt, 44 La. Ann., 264 (1892). But a tenant cannot carry with him the exclusive right to use the name "Tower Palace" if that is not a trade-mark, but is the name of the building, although he was the first to occupy it, and used the name extensively in advertising. Armstrong v. Kleinhaus, 82 Ky., 303 (1884), aff'g 1 Ky. Law R., 112 (1880). Where the name of the grantor of a shop is carved in stone over the door, such stone forming a part of the freehold, the grantor, in the absence of a covenant to that effect, cannot compel the grantee to erase the name, although it can be done without much trouble. Townsend v. Jarman [1900], 2 Ch., 698, 705].

[Where a grantor of land, as a part of the consideration, reserves, in the deed, his maintenance during his natural life, this does not make him a "fixture," so as to require his maintenance upon the land. Bonebrake v. Summers, 8 Pa. Super., 55, 71 (1898).]

thorities. This difference of opinion has hitherto related [*10] *mainly to what amounts to an annexation sufficient to convert an article from a mere chattel to a fixture.

With the exception of the cases of constructive annexation, heir-looms, charters, etc, referred to by most of the cases on the subject as being exceptions to the general rule as to annexation, and the propriety of which is on all hands acknowledged, there is a numerous class of cases both in England and America, which hold that there must be in all cases some degree of physical annexation of the chattel to the realty in order to constitute a fixture. With respect, however, to what constitutes annexation, or the requisite degree thereof, there exists even among these cases, a wide diversity of opinion. With reference to this subject, Mr. Ferard observes that "it is necessary, in order to constitute a fixture, that the article in question should be let into or united to the land, or to some subject previously connected with the land. It is not enough that it has been laid upon the land, and brought into contact with it; the definition requires something more than mere juxtaposition: as that the soil shall have been displaced for the purpose of receiving the article, or that the chattel should be connected, or otherwise fastened to, some fabric previously attached to the ground." [2] The same meaning is attached to the term in the English note to Elwes v. Maw, in Smith's Leading Cases,[3] and is adopted by the older, and many of the more modern authorities, which will be found referred to in the following pages and the notes thereto.

This view of the law on this subject has been illustrated by many cases, and though they are not believed to be entirely correct in principle, perhaps the subject cannot be better unfolded than by stating some of the leading cases upon the point.

The case of Culling v. Tuffnal,[4] before Treby, C. J., at Hereford, 1694, is generally referred to in this connection, and though

[2] Ferard, Fixt. 2. See, however, the subject more fully considered further on.

[3] Bull. N. P., 34.

[4] 2 Smith's Lead. Cas., *239. "By the expression annexed to the freehold, is meant fastened to or connected with it; mere juxtaposition, or the laying of an object, however heavy, on the freehold, does not amount to annexation." See, however, American note to same case on page *250.

*the case was originally decided upon the ground of a cus- [*11] tom for tenants to carry away such structures at the end of their term, it has subsequently been considered to have been properly ruled, on the ground of its not being fixed to the ground. "In trover for ten loads of timber, the case was, that the defendant had been tenant to the plaintiff, and erected a barn upon the premises, and put it upon pattens and blocks of timber lying upon the ground, but not fixed in or to the ground; and upon proof that it was usual in that country to erect barns so, in order to carry them away at the end of the term, a verdict was given for the defendant." With reference to this case, Lord Ellenborough, in Elwes v. Maw,[5] observed: "To be sure, he might [remove them], and that without any custom, for the terms of the statement exclude them from being considered as fixtures; 'they were not fixed in or to the ground.'"

In Rex v. Londonthorpe,[6] the question was, whether or not a pauper had gained a settlement in A. by the taking of a tenement at £10 per annum. The pauper rented land of the annual value of £6 10s 6d. The erection in question was a post wind mill, constructed by the tenant at an expense of £120 upon a part of the demised premises, upon cross traces laid upon brick pillars, but not attached or affixed thereto, which was the usual mode of building mills of that nature, and which he was to be at liberty to remove at pleasure;[7] he let the mill for a portion of the time at £9 per annum, and during this time resided in the tenement at £6 per annum; and upon this state of facts the court were of opinion that this wind-mill was a mere chattel, and that the pauper gained no settlement.

[5] 3 East, 38 (1802); see, also, Shinner v. Harman, 3 Ir. Com. Law, 243, 247 (1853).

[6] 6 Term, 377 (1795); so in Ward's Case, 4 Leon., 241 (1611), where it was adjudged that if a mill be set upon posts, no waste lyeth for it. See, also, Kimpton v. Eve, 2 Ves. & B., 349 (1813). See, however, Bedford Election Case, 2 Luder, case 12, p. 440 (1785), where a windmill fixed on a post, upon pattens in a foundation of brickwork, was held a freehold estate. Here, however, nothing was expressly proved to show the plot of ground on which it stood to belong particularly to the voter; and nothing on the other hand to show that it did not.

[7] No reference is made by the court to this agreement, and it does not seem to have formed a ground for the decision of the case. See *post* ch. 3.

[*12] *Rex v. Otley [8] was very similar in its facts to Rex v. Londonthorpe (*supra*), but was attempted to be distinguished from that case because the tenant there had permission from the landlord to put up the mill, and it was treated by both as a chattel; this circumstance was, however, considered to make no difference, and the opinion was expressed that to constitute a tenement, it was necessary that the structure should be affixed to the soil, or to something annexed to the soil.

The case of Horn v. Baker [9] recognizes the same distinction. This was a case respecting the right of the assignees of a bankrupt to goods and chattels in the order and disposition of the bankrupt, under the Statute 21 Jac. I. c, 19, s, 10 & 11. The articles in question consisted of stills and vats. The stills were set in brick-work and let into the ground. Some of the vats or worm-tubs were supported by, and rested upon, brick-work and timber, but were not fixed in the ground; others stood on horses or frames made of wood, which were not let into the ground, but stood upon the floor. The court in this case, per Ellenborough, C. J., observed that there was a material distinction between such of the vats and stills as were affixed to the freehold, and those which were movable being the ones resting upon brick-work or frames, which latter were considered to be goods and chattels within the meaning of the act.

The case of Walker v. Sherman [10] is the leading case in the United States upon the point under consideration. This was a motion to set aside the report of the commissioners in partition, on the ground that they had improperly made partition between the parties, who were tenants in common in equal moieties of a woolen factory; and one of the grounds of the motion was, that the commissioners in making partition had mistaken the character of several articles of machinery belonging to the mill, considering them as personal property, whereas they should have been regarded as real estate, and had in effect, therefore, passed to the plaintiff, to whom the mill and its appurtenances were awarded and set off in severalty. The ma-
[*13] *chinery in question consisted of double carding machines,

[8] 1 B. & Ad., 161 (1830).
[9] 9 East, 215 (1808).
[10] 20 Wend., 636 (1839).

a picking machine, shearing machine, spinning machine, looms, etc., which were in the factory, but not in any manner affixed or fastened to the building or land, though they had been used and passed from one owner of the factory to another as parts of the factory, for eleven years or more, and were as material to its performance in certain departments of its work as the machinery which was actually affixed to the freehold, and which was treated as real estate by the commissioners.

The opinion of the court was delivered by Cowen, J., who considered the question which arose between tenants in common, the owners of the fee, as one to be decided on the same principle as if it had arisen between grantor and grantee, or as if partition had been effected by the parties through mutual deeds of bargain and sale (between which parties the doctrine of fixtures making a part of the freehold, and passing with it is more extensively applied than between any others), and who, after a full and elaborate consideration of the authorities, deduced, and laid down the following general rule: "In order to come within the operation of a deed conveying the freehold, whether by metes and bounds of a plantation, farm or lot, etc., or in terms denoting a mill or factory, etc., nothing of a nature personal in itself will pass unless it be brought within the denomination of a fixture by being in some way permanently, at least habitually, attached to the land or some building upon it." He then proceeded as follows: "It need not be constantly fastened. It need not be so fixed that detaching will disturb the earth or rend any part of the building. I am not prepared to deny that a machine movable in itself would become a fixture from being connected in its operation by bands or in any other way with the permanent machinery, though it might be detached and restored to its ordinary place as easily as the chain in Farrar v. Stackpole.[1] I think it would be a fixture notwithstanding. But I am unable to discover from the papers before us that any of the machines in question before the commissioners were even slightly con*nected with the freehold. For aught I can [*14] learn, they were all worked by horses or by hand, having no more respect to any particular part of the building or its water wheel, than the ordinary movable tools of such an establishment.

[1] 6 Me., 154 (1829).

These would have their common places, and be essential to its business; so a threshing-machine and the other implements of the farmer. But it would be a solecism to call them fixtures, where they are not steadily or commonly attached, even by bands or hooks, to any part of the realty. The word fixtures is derived from the things signified by it being fastened, or fixed. 'It is a maxim of great antiquity, that whatever is fixed to the realty is thereby made a part of the realty, to which it adheres, and partakes of all its incidents and properties.' Toml. Law Dict. Fixtures. Hence fixtures are defined to be chattels or articles of a personal nature which have been affixed to the land, Id. 'It is an ancient principle of law,' says Weston, J., in Farrar v. Stackpole, 'that certain things which in their nature are personal property, when attached to the realty become part of it as fixtures;' and see Amos & Fer. on Fixt., ch. 1, p. 1.

"It is not to be denied that there are strong *dicta,* and perhaps we may add the principle of several adjudicated exceptions, upon which we might, with great plausibility, declare the machines in question, so essential to the purposes of the manufactory, although entirely dissociated with the freehold, a fit subject for entering into the list of constructive fixtures. The general importance of the rule, however, which goes upon corporal annexation, is so great, that more evil will result from frittering it away by exceptions, than can arise from the hardship of adhering to it in particular cases. * * * We think the motion must be denied with costs, and the report of the commissioners is confirmed."

The same distinction has been enforced in other cases, both English and American, which will be found referred to in the note below,[1] and in the following pages.

[1] Wansbrough v. Maton, 4 Ad. & E., 884 (1836); s. c., 6 N. & M. 367; 2 H. & W. 37; 4 L. J. (N. S.), K. B., 154; 5 id. 150, where a wooden barn erected by a tenant, and resting on, but not fastened by mortar or otherwise, to the caps of blocks of stone called stavels, or staddles, fixed into the ground or let into brickwork, which barn could be removed without injury to the rest, was held to be a chattel. [See, also, Carlin v. Ritter, 68 Md., 478, 492 (1888); Weathersdane Park Co. v. Watson, 16 Viet., 758, 760 (1890).] So in Wiltshear v. Cottrell, 1 Ell. & Bl., 674; s. c., 17 Jur. 758; 22 L. J. Q. B. 177; 18 Eng. L. & Eq., 142 (1853), a granary laid on a wooden foundation lying on and supported by staddles, but not attached

thereto except by its weight, was held to be a mere chattel. [See, also, Brannon v. Vaughn, 66 Ark., 87, 90 (1898); Miller v. Waddingham, 91 Cal., 377, 379 (1891).] See, however, Landon v. Platt, 34 Conn., 517 (1868), which was the case of a barn erected by the owner of the land, on stone piers resting on the ground, and which was held to be a part of the realty. [See, also, Central Branch R. R. Co. v. Fritz, 20 Kans., 430, 434 (1878); State Sav. Bank v. Kercheval, 65 Mo. 682 (1877); Adams v. Kauwa, 6 Hawaii, 280 (1881); Doran v. Willard, 14 N. Bruns., 358 (1873); McKenzie v. McDonald, 2 Nova S., Dec., 11, 12 (1869).]

So in O'Donnell v. Hitchcock, 118 Mass., 401 (1875), a small building erected by a tenant, a photographer, for use in his business, and built in sections, and framed so as to be capable of being taken apart without cutting, and simply resting upon the top of the unbroken ground, was held to be a mere chattel, and subject to attachment by the creditors of its owner after the abandonment of it and the premises by the tenant. [A greenhouse resting upon the ground, but not attached thereto, unless very slightly for the purpose of keeping it steady, is, as between a tenant and a mortgagee of the land, personal property. Royce v. Latshaw, 15 Colo. App., 420 (1900). See, also, Dixon v. Mackay, 38 Can. Law J., 653 (Man., 1902).]

A small frame building called a cabin, erected upon land of the U. S., by being set upon blocks resting upon the surface of the ground, and not attached thereto, and removable without disturbing the soil, *held* to be personal property not passing with the land, but removable by the owner upon leaving the land after its sale by the U. S.; and it seems that the same is true of a portable fence, composed of posts and boards, and resting wholly upon the surface of the land. Pennybacker v. McDougal, 48 Cal., 160 (1874). [See, also, Comm'rs of Rush County v. Stubbs, 25 Kans., 322, 325 (1881); Central Branch R. R. Co. v. Fritz, 20 Kans., 430, 438 (1878); Dietrichs v. Lincoln & N. W. R. R. Co., 13 Nebr., 43 (1882). *Contra*, Doscher v. Blackiston, 7 Oregon, 143, 146 (1879).]

See, also, Farrant v. Farrant, 2 Wash. Law Rep., 137 (1875), where a dwelling house, standing on blocks or rollers and not fastened to the ground, so built by tenant for the purpose of removal if necessary, was held to be personal property; Mills v. Redick, 1 Neb., 437 (1871). [See, *post*, p. *134. See, also, Nigro v. Hatch, 2 Ariz., 144 (1886); Security Loan Co. v. Williamette Mills Co., 99 Cal., 636 (1893); Robinson v. Wright, 9 D. C., 54, 56 (1875); Smyth v. Stoddard, 203 Ill., 424, 432 (1903); Turner v. Kennedy, 57 Minn., 104, 107 (1894); Page v. Urick, 31 Wash., 601 (1903). But such buildings are properly assessed as realty. Milligan v. Drury, 130 Mass., 428 (1881).]

In Davis v. Jones, 2 B. & Ald., 165 (1818), where the question arose between the tenant and one claiming under the landlord, the articles in question were certain pieces of machinery called jibs, described as follows: certain caps and steps of timber were fixed into the buildings, and the jibs were placed on these caps and steps. They were fastened by pins above and below, and might be taken in and out of the caps or steps without injuring either them or the building, but could not be removed without

being a little injured themselves. They were usually valued between out-going and in-coming tenants. The court were of opinion that the jibs were, as between landlord and tenant, personal chattels. In coming to this conclusion they seem to have relied somewhat upon the fact that they were usually valued between out-going and in-coming tenants, and state that such a practice could not rationally have prevailed, if the things had not been generally understood to be in their nature capable of removal, and not fixtures properly so called. See, also, Minshall v. Lloyd, 2 M. & W., 450, 460 (1837). It was argued for the defendant in this case, with great cogency it seems to us, that these things constituted part of one entire machine, of which the other parts were fixed to the freehold, and that they did not come within the description of goods and chattels, and, therefore, that trover would not lie for them. The case does not seem entirely satisfactory upon the point under consideration, and has been criticised by Mr. Ferard in his work on Fixtures, page 5, note (a). See, also, Walker v. Sherman, 20 Wend., 636, 653 (1839); *Ex parte* Astbury, L. R., 4 Ch. App., 630 (1869); Fisher v. Dixon, 12 Cl. & Fin., 312 (1845).

In Holbrook v. Chamberlin, 116 Mass., 155 (1847); s. c., 17 Amer. Rep. 146, a portable wood-cutting machine, weighing about 300 lbs., and standing on the premises described in a lease, but outside of, and eighteen inches distant from, the mill thereon, and worked by a belt running from the main shaft to the factory, was held to be a mere chattel, and not to pass by a lease of the factory and land, and for the destruction of which the lessor could maintain no action upon the covenants of his lease. See, also, Whiting v. Brastow, 4 Pick., 310 (1826).

So, an iron safe and an iron planing-mill not attached to the freehold, are personal property, and liable to seizure on *fi. fa.* against the owner of them. Titus v. Mabee, 25 Ill., 257 (1861). [A mortgage of a saw-mill with all of its "fixtures and appurtenances" does not include an iron safe. Conner v. Littlefield, 79 Texas, 76, 77 (1890). An iron safe which is placed in a vault before its completion is personal property, although the vault door must be removed in order to remove such safe. Sheldon v. Cook, 11 Chi. Legal News, 76 (Ill. App., 1878).]

[Where stringers were laid upon earth, and planks nailed to the stringers, the stringers gradually sinking into the earth by their own weight, such planking does not become a part of the realty, nor even a trade-fixture. Crerar v. Daniels, 109 Ill. App., 654 (1903).]

So, as to a carding machine standing on, but not fastened to, the floor of the building. Taffe v. Warnick, 3 Blackf., 111 (1832). A heater placed in a vat in a tannery by a conditional vendee of land, the vat being detached from the building, except that a small piece of board was tacked to the vat and the side of the building, but which fastening was unnecessary, and of no use, except to keep the side standing while the vat was being put together, is a mere chattel; and it seems that such would be the case even if placed therein by the owner of the freehold. Raymond v. White, 7 Cow., 319 (1827).

[Wagons constructed of sheet and cast iron, being four feet long and three feet wide, and twenty-six inches deep, with three adjustable wheels about eight inches in diameter on each wagon, used in a mill for the purpose of holding syrup and conveying it from place to place by hand on the floor of the mill until it was converted into sugar, are not fixtures, although sugar-mills cannot be successfully operated without them. They do not enhance the value of the mill; they are not constructively annexed, but must be classed with buckets, barrels and similar vessels. Winslow v. Bromich, 54 Kansas, 300, 305 (1894).]

The following cases also recognize the doctrine that, as a general rule, some degree of actual annexation or fixation is necessary to constitute a fixture. Laflin v. Griffiths, 35 Barb., 58, 62 (1860); Potter v. Cromwell, 40 N. Y. (1 Hand), 287, 295 (1869); Voorhees v. McGinnis, 48 N. Y., 278, 282 (1872); Hoyle v. Plattsburgh and Montreal R. R. Co., 54 N. Y., 314, 323 (1873); Vanderpool v. Van Allen, 10 Barb., 157, 162 (1850); Stevens v. Buffalo, etc., R. R. Co., 31 Barb., 590, 605 (1858); Beardsley v. Ontario Bank, 31 Barb., 619, 634 (1859); Noyes v. Terry, 1 Lans., 219, 220 (1869); Fairis v. Walker, 1 Bail., 540 (1830); Lathrop v. Blake, 23 N. H., 46, 66 (1851); Despatch Line of Packets v. Bellamy Manf'g Co., 12 N. H., 205, 234 (1841); Brown v. Lilie, 6 Nev., 244 (1870); Merritt v. Judd., 14 Cal., 59, 64 (1859); Pennybacker v. McDougal, 48 Cal., 160 (1874); Baldwin v. Breed, 16 Conn., 60, 66 (1843); Capen v. Peckham, 35 Conn., 88, 93 (1868); Stockwell v. Campbell, 39 Conn., 362, 364 (1872); Potts v. New Jersey Arms Co., 17 N. J. Eq., 395, 404 (1866); Quimby v. Manhattan Cloth Co., 24 N. J. Eq., 260 (1873); Teaff v. Hewitt, 1 Ohio St., 511, 527 (1853); Eaves v. Estis, 10 Kan., 314, 316 (1872); Congregational Society of Dubuque v. Fleming, 11 Iowa, 533, 535 (1861); Cook v. Whiting, 16 Ill., 480 (1855); Cole v. Roach, 37 Tex., 413, 418 (1872); Butler v. Cozens, 6 Vin. Abr., 357 in margin; s. c. 11 Mod., 198 (1708); Stead v. Gamble, 7 East, 325 (1806); Hedge's Case, 1 Leach Cr., L. 240 (1779); Anthony v. Haneys, 8 Bing., 186 (1832); Naylor v. Collinge, 1 Taunt., 19 (1807); Turner v. Cameron, L. R., 5 Q. B., 306, 311 (1870); s. c., 39, L. J. Q. B., 125; 9. B. S., 931; 22 L. T. (N. S.), 525; 18 W. R., 544, Duke of Beaufort v. Bates, 2 DeG. F. & J., 381 (1862); s. c., 8 Jur. (N. S.), 270; 10 W. R. 200; 6. L. T. (N. S.), 82. See, however, D'Eyncourt v. Gregory, L. R. 3 Eq., 382, 396 (1866); Holland v. Hodgson, L. R., 7 C. P., 328, 334 (1872), and the cases hereinafter cited. [Bayne v. Brewer Pottery Co., 90 Fed., 754 (1898); Miller v. Waddingham, 11 L. R. A., 510, 511 (Cal., 1891); Southbridge Bank v. Mason, 147 Mass., 500, 505 (1888); Shepard v. Blossom, 66 Minn., 421, 423 (1896); Farmers' L. & T. Co. v. Minneapolis Works, 35 Minn., 543, 548 (1886); Wolford v. Baxter, 33 Minn., 12, 17 (1884); Loan v. Gregg, 55 Mo. App., 581, 584 (1893); Hillebrand v. Nelson, 95 N. W., 1068, 1070 (Nebr., 1901); Williamson v. New Jersey S. R. R. Co., 29 N. J. Eq., 311, 329 (1878); Blancke v. Rogers, 26 N. J. Eq., 563, 567 (1875); Bellamy v. Davey [1891], 3 Ch., 540, 544; Keefer v. Merrill, 6 U. C. App., 121 (1881); see, also, Tillman v. DeLacy, 80 Ala, 103, 106 (1885).]

[*15] *Among the cases, however, requiring actual physical annexation as an essential element of a fixture, there is an irreconcilable diversity of opinion as to the requisite degree thereof necessary to constitute a fixture.

[*16] *Thus, some of these cases require the chattel to be substantially annexed to the freehold in such a manner as not to [*17] per*mit it to be separated from it without material injury to itself or to the freehold.[1]

In others, the slightest annexation has been held sufficient.[2] While still another class of authorities reject entirely the doctrine that physical annexation is a necessary attribute of a fixture.

[1] Hill v. Wentworth, 28 Vt., 428, 433 (1856); Fullam v. Stearns, 30 Vt., 443, 452 (1857); Bartlett v. Wood, 32 Vt., 372 (1859); Harris v. Haynes, 34 Vt., 220, 225 (1861); Sweetzer v. Jones, 35 Vt., 317 (1862); Lacey v. Giboney, 36 Mo., 320, 324 (1865); Montague v. Dent, 10 Rich. Law., 135, 139 (1856); Swift v. Thompson, 9 Conn., 63, 67 (1831); Dubois v. Kelly, 10 Barb., 496, 505 (1851); Wade v. Johnston, 25 Geo., 331, 336 (1858); Providence Gas Co. v. Thurber, 2 R. I., 15 (1851); see, also, Gale v. Ward, 14 Mass., 352, 356 (1817); The Patent Peat Co., 27 L. T. (N. S.). 69, 71 (1867). [See, also, Marshall v. Bacheldor, 47 Kansas, 442, 443 (1891); Triplett v. Mays, 13 Ky. Law R., 874, 875 (Superior Ct., 1892); Brown v. Baldwin, 121 Mo., 126, 135 (1893); Friedlander v. Ryder, 30 Nebr., 783, 789 (1890); Conde v. Lee, 55 App. Div., 401, 403 (1900), aff'd 171 N. Y., 662 (1902); Newport Co. v. Assessors, 19 R. I., 632, 637 (1896).]

A part of this diversity may doubtless be explained by considering the ambiguity of the term fixtures, and the differing relations of the parties between whom the questions arose (a more liberal rule, as will be seen hereafter, being applied in some relations than in others); but these considerations only partially remove the difficulty.

In Vermont the rule seems to have been uniformly held, irrespective of the relation of the parties, "that a chattel is not to lose its personal identity as such unless it has been substantially annexed to the freehold, in a manner which would not permit it to be separated from it without material injury to itself or to the freehold." See Hill v. Wentworth, 28 Vt., 428, 433 (1856); Sturgis v. Warren, 11 Vt., 433 (1839); Cross v. Marston, 17 Vt., 533 (1845); and the cases therein and above cited. [See, also, Kendall v. Hathaway, 67 Vt., 122, 126 (1894).]

[2] See observations of Cowen, J., in Walker v. Sherman, 20 Wend. 636, 655 (1839), quoted *ante* p. *13. [See, also, Hamilton v. Huntley, 78 Ind., 521, 524 (1881); Central Branch R. R. Co. v. Fritz, 20 Kansas, 430, 434 (1878). As between a mortgagor and a mortgagee of a leasehold, see *Re* Calvert [1898], 2 I. R., 501, 506. In the case of motive power for a factory the slightest annexation is sufficient. Hart v. Sheldon, 41 Supr. Ct. (34 Hun), 38, 44 (N. Y., 1884).]

Farrar v. Stackpole [3] is often referred to as an authority on this point. The action was trover for a mill-chain, dogs and bars, the plaintiffs claiming title to the property under a deed *from the defendant to Asa Redington, and from him to [*18] them, conveying a saw mill, *eo nomine,* with the privileges and appurtenances, and they proved that the chain, dogs and bars were in their appropriate places when the deed was made, and that the chain was attached by a hook to a piece of a draft-chain, which was fastened to the shaft by a spike, the chain being prepared for being hooked and unhooked at pleasure. It was insisted that the chain was of the nature of personal property, and therefore did not pass by a deed of the realty, unless specially named. To this it was answered by the court, per Weston, J., "1st, that if it be an essential part of the mill, it is included in that term, whether real or personal; 2d, that that which is in its nature personal, may change its character if fixed, used and appropriated to that which is real. Is it too much to say that the mill is incomplete without a chain, a cable, or other substitute? * * * If it is in its nature essential to the mill, it is included in that term; and that, as has been before remarked, whether it be personal or real property. But upon consideration, we are of opinion that it ought to be regarded as appertaining to, and constituting a part of, the realty. It is an ancient principle of law, that certain things which in their nature are personal property, when attached to the realty become part of it as fixtures. One criterion is, that if that which is ordinarily personal, be so fixed to the realty that it cannot be severed therefrom without damage, it becomes part of the realty—as wainscot-work and old fixed and dormant tables and benches. Other things pass as incident to the realty—as doves in a dove house, fish in a pond, or deer in a park. 2 Com. Dig. Biens, B. On the other hand, as between landlord and tenant, for the benefit of trade in modern times, many things are regarded as personal, which, as between the heir and executor, would descend to the heir as part of the inheritance.

[3] 6 Me., 154 (1829). See, also, Strickland v. Parker, 54 Me., 263 (1866); Parsons v. Copeland, 38 Me., 537 (1854). See, however, Capen v. Peckham, 35 Conn., 38 (1868).

"Although the being fastened or fixed to the freehold is the leading principle in many of the cases in regard to fixtures, it has not been the only one. Windows, doors and window shutters are often hung but not fastened to a building, yet they are properly part of the real estate, and pass with it, because [*19] *it is not the mere fixing or fastening which is regarded, but the use, nature and intention. Dane's Abr. Ch. 76, Art. 8, §39. * * * Salt pans have been held to pass [with] the realty, and to belong to the inheritance; because adapted and designed for, and incident to, an establishment for the manufacture of salt.[1] The principle is, that certain things personal in their nature, when fitted and prepared to be used with real estate, change their character and appertain to the realty as an incident or accessory to its principal. Upon this ground we are satisfied that the chain in question being in the mill at the time, and essential to its beneficial enjoyment, passed by the deed of the defendant to Asa Redington, under whom the plaintiffs claim, independent of any reference to usage."

The principle last above laid down in said case was approved in Voorhis v. Freeman.[2] This was the case of a sale under *levari facias* on a mortgage of "a lot or piece of ground with one iron rolling mill establishment situate thereon, with the buildings, apparatus, steam engine, etc., attached to the said establishment;" and the question arose between the vendee under said sale, and subsequent execution vendee under a judgment against a former owner of the mill, of the articles in question as chattels, which were iron rolls of different shapes and sizes, part of the machinery of said rolling mill, part of which were duplicates, but were necessary and proper for an emergency to replace broken ones, and all of which had at one time or another been in actual use in said mill. The question was simply whether such rolls were real or personal property, and it was held that the rolls in question passed as part of the freehold; but that even if they had not passed, they could

[1] The case referred to is probably, Lawton v. Salmon, 1 H. Bl., 259, note (1782); but in this case the pans were placed in the work by the ancestor, and were fixed with mortar to a brick floor, and though removable without injuring the buildings, the salt works would be of no value without them, while with them they were let for £8 per week.

[2] 2 W. & S., 116 (1841).

not have been sold as chattels on *levari facias*. Pyle v. Pen-
*nock [3] was very similar in its facts, and was ruled upon [*20]
the same principle.

These cases might, perhaps, be sustained upon the doctrine of constructive annexation, or upon the ground that a temporary severance of a fixture, with a view of its being replaced thereafter, does not alter its nature, (a subject to be hereafter considered), without discarding the requirement of annexation; the reasoning of the court, however, seems to go to that extent, and to place the test of a fixture upon its having been fitted and prepared to be used with, and being essential to, the beneficial enjoyment of the realty; and subsequent cases in Pennsylvania have expressly repudiated the criterion of physical attachment.[4] The same doctrine has also been more or less directly approved in other cases.[5]

[3] 2 W. S., 390 (1841). In this case, at the time of the sheriff's sale, the housings in the rolling mill were filled with rolls, with the exception of one set. There were other rolls in the mill which had been removed from the housings, and were not at that time connected therewith. The rolls could be placed in the housing and removed at pleasure, and it was usual to have more rolls than housings in order to change them when it was proposed to manufacture different kinds of iron. The floor of the bar-iron mill was covered with plates of defective boiler iron, and it was usual and necessary that the floor should be covered with iron of some sort. The plates were not manufactured for the purpose of being used as a floor, were kept down by their own weight, and could be removed without injury to any other part of the building. Both rolls and plates were held to be part of the realty, and to pass by a sale of the rolling mill. See, also, *Ex parte* Astbury, L. R. 4 Ch. App., 630 (1869); Metropolitan Counties, etc., Society v. Brown, 26 Beav., 454 (1859).

[4] Christian v. Dripps, 28 Penn. St., 271, 278 (1857); Hill v. Sewald, 53 Penn. St., 271 (1866); Meig's Appeal, 62 Penn. St., 28 (1869); Patterson v. Delaware Co., 70 Penn. St., 381, 385 (1872); Seeger v. Pettit, 77 Penn. St., 437 (1875); s. c., 11 Alb. Law Jour., 151; 1 Weekly Not. Cas., 226. See, also, Gray v. Holdship, 17 S. & R., 413 (1828). [Morris's App., 88 Pa. St., 368, 383 (1879); Wick v. Bredin, 189 Pa. St., 83, 92 (1889); Justice v. Nesquehoning R. R. Co., 87 Pa. St., 28, 33 (1878); Ege v. Kille, 84 Pa. St., 333, 340 (1877); Bradley v. Ritchie, 12 Pa. Dist., 658 (1903); Huston v. Clark, 3 Pa. Dist., 2, 3 (1882); Advance Coal Co. v. Miller, 4 Pa. Dist., 352, 355 (1895); Latta v. Cambridge Springs Co., 25 Pa. Co., 310, 312 (1901); Ritchie v. McAllister, 14 Pa. Co., 267, 271 (1894); Security Co. v. Security Co. of Pottstown, 13 Montg. Co., 126, 130 (1897); Williams's App., 1 Monaghan, 274, 282 (1889); Central Trust Co. v. Cameron Iron

[*21] *The simple test of adaptation and preparation to be used with, and being essential to, the beneficial enjoyment of the realty, is properly subject to the criticism of utterly confounding the rule by which the rights of the vendor and vendee, heir and executor, etc., have been hitherto governed. "If adaptation and necessity for the use and enjoyment of the realty be the sole test of a fixture, then the implements and domestic animals necessary for the cultivation of a farm, and a great variety of other articles subject to the use of the land or its appurtenances, which never have been and never can be recognized as such, would be fixtures."[6] It seems clear, however, on the other hand, that making physical annexation in the sense

Co., 21 Pitts. Leg. J. (N. S.), 377 (U. S. C. C., Pa., 1891); see, also, Huston v. Clark, 162 Pa. St. 435 (1894); Harrisburg Light Co. v. Goodman, 129 Pa. St., 206 (1889); New Chester Water Co. v. Holly Mfg. Co., 53 Fed., 19, 29 (U. S. C. C. A., Pa., 1892), aff'g Holly Mfg. Co. v. New Chester Water Co., 48 Fed., 879, 888 (U. S. C. C., Pa., 1891); Wilder v. Kent, 15 Fed., 217 (U. S. C. C., Pa., 1883).]

[5] Palmer v. Forbes, 23 Ill., 301, 313 (1860); Huebschmann v. McHenry, 29 Wisc., 655, 661 (1872); Bryan v. Lawrence, 5 Jones' Law., 337 (1858); Latham v. Blakely, 70 N. C., 368 (1874); Deal v. Palmer, 72 N. C., 582 (1875). See, also, Hunt v. Bullock, 23 Ill., 320 (1860); Minnesota Co. v. St. Paul Co., 2 Wall., 609, 646, note (1864); Cole v. Roach, 37 Tex., 413, 419 (1872); Hoyle v. Plattsburg, etc., R. R. Co., 51 Barb., 62 (1868), per Ingraham, J.; s. c., 54 N. Y., 314; Fisher v. Dixon, 12 Cl. & Fin., 312 (1845); Brown Fixt., § 76 a. [Cary Hardware Co. v. McCarty, 10 Colo. App., 200, 220 (1897); Otis v. May, 30 Ill. App., 581, 586 (1888); Kloess v. Katt, 40 Ill. App., 99, 100 (1891); Dutton v. Ensley, 21 Ind. App., 46, 49 (1898); Green v. Chicago, R. I. & P. R. R. Co., 8 Kansas App., 611, 613 (1899); Marshall v. Bacheldor, 47 Kansas, 442, 443 (1891); Reyman v. Henderson Nat. Bank, 17 Ky. Law R., 1291, 1292 (1896); Davis v. Eastham, 4 Ky. Law R., 850, 851 (1883); Equitable Trust Co. v. Christ, 47 Fed., 756, 757 (U. S. C. C., Mich., 1880); Brown v. Reno Power Co., 55 Fed., 228, 234 (U. S. C. C., Nev., 1893); McRea v. Central Bank, 66 N. Y., 489, 495 (1876); Berliner v. Piqua Club, 66 N. Y. Supp., 791, 792 (1900); Taylor v. Collins, 51 Wis., 123, 129 (1881); Dickson v. Hunter, 29 Gr. Ch., 73 (Ont., 1881); McDonald v. Weeks, 8 Gr. Ch., 297 (Ont., 1860); Pronguey v. Gurney, 37 U. C. Q. B., 347, 353 (1875); Kirkpatrick v. Cornwall St. Ry. Co., 2 Ont. Law R., 113, 123 (App., 1901); see, also, Hill v. Mundy, 89 Ky., 36, 38 (1889); Pope v. Jackson, 65 Maine, 162, 165 (1876); Smith v. Blake, 96 Mich., 542, 544 (1893).]

[6] Per Bartley, C. J., in Teaff v. Hewitt, 1 Ohio St., 511, 529 (1853); see, also, Walker v. Sherman, 20 Wend., 636, 654 (1839), per Cowen, J.

in which the term is used by Mr. Ferard in his work on fixtures,[7] the sole test, or even a necessary element of a fixture, is entirely too arbitrary and artificial a rule. Moreover the admitted and unquestioned exceptions of the cases of constructive annexation, of which keys belonging to a house are a familiar instance, do not seem consistent with the correctness of the rule. Undoubtedly physical annexation exists in the great majority of cases under this branch of the law, and is an important, and often as bearing upon the question of intention, a controlling element in determining the question whether an article is or is not a fixture; but the weight of modern authority and of reason, keeping in mind the exceptions as to constructive annexation admitted by all the authorities to exist, seems to establish the doctrine that the true criterion of an irremovable fixture consists in the united application of several tests:

1st. Real or constructive annexation of the article in question to the realty.[8]

*2d. Appropriation or adaptation to the use or purpose [*22] of that part of the realty with which it is connected.[9]

3d. The intention of the party making the annexation to make the article a permanent accession to the freehold, this

[See, also, Southbridge Bank v. Mason, 147 Mass., 500, 505 (1888); Hillebrand v. Nelson, 95 N. W., 1068, 1070 (Nebr., 1901); Williamson v. New Jersey S. R. R. Co., 29 N. J. Eq., 311, 328 (1878).]

[7] Page 2.

[8] In New Hampshire it is deemed necessary that machines or other articles should in some way have been connected with the realty, or have been so placed that the removal of them would involve either the destruction or impairment or substantial injury of the freehold, in order that the same should be regarded as constituting a part of it. But the character of the fastening, as being slight or otherwise, is a criterion of a questionable character; more depends on the nature of the article and its use, as connected with the use of the freehold. See Despatch Line of Packets v. Bellamy Man'f'g Co., 12 N. H., 205, 233 (1841); Lathrop v. Blake, 23 N. H., 46, 66 (1851); Burnside v. Twitchell, 43 N. H., 390, 394 (1861); Fortman v. Goepper, 14 Ohio St., 558, 567 (1863); Wagner v. Cleveland, etc., R. R. Co., 22 Ohio St., 563, 577 (1872).

"It is the permanent and habitual annexation, and not the manner of fastening, that determines when personal property becomes a part of the realty." Strickland v. Parker, 54 Me., 263 (1866). See, also, Parsons v. Copeland, 38 Me., 537 (1854).

[9] See cases cited in note ([8]) *supra*.

intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation and the policy of the law in relation thereto, the structure and mode of the annexation and the purpose or use for which the annexation has been made.[10]

[10] The rule is laid down in Teaff v. Hewitt, 1 Ohio St., 511, 530 (1853), substantially as above stated, except that actual annexation alone is made a requisite in the first subdivision of the rule. The rule as stated in Teaff v. Hewitt, is approved in Eaves v. Estes, 10 Kan., 314, 316 (1872); Funk v. Brigaldi, 4 Daly, 361 (1873); Potter v. Cromwell, 40 N. Y., 287, 296 (1869); Quinby v. Manhattan Cloth Co., 24 N. J. Eq., 260 (1873); Potts v. New Jersey Arms Co., 17 N. J. Eq., 395, 404 (1866); Rogers v. Brokaw, 25 N. J. Eq., 496, 498 (1875); Edwards v. Derrickson, 28 N. J. Law, 39, 56 (1859); Redlon v. Barker, 4 Kan., 445, 451 (1868); Rogers v. Crow, 40 Mo., 96 (1867); Green v. Phillips, 26 Gratt., 752, 759 (1875). See, also, Fortman v. Goepper, 14 Ohio St., 558, 567 (1863). [Tillman v. DeLacy, 80 Ala., 103 (1885); Langston v. State, 96 Ala., 44, 46 (1891); Rogers v. Prattville Mfg. Co., 81 Ala., 483 (1886); DeLacy v. Tillman, 83 Ala., 155 (1887); Fechet v. Drake, 2 Ariz., 239 (1887); Markle v. Stackhouse, 65 Ark., 23, 26 (1898); Lavenson v. Standard Soap Co., 80 Cal., 245, 250 (1889); Fratt v. Whittier, 58 Cal., 126, 131 (1881); Roseville Min. Co. v. Iowa Gulch Co., 15 Colo., 29, 32 (1890); Fisk v. People's Bank, 14 Colo. App., 21, 26 (1899); Tolles v. Winton, 63 Conn., 440, 445 (1893); Towson v. Smith, 13 App., D. C., 48, 56 (1898); Sword v. Low, 122 Ill., 487, 496 (1887); Hacker v. Munroe, 176 Ill., 384, 396 (1898); Arnold v. Crowder, 81 Ill., 56, 58 (1876); Calumet Iron Co. v. Lathrop, 36 Ill. App., 249, 255 (1889); Kaestner v. Day, 65 Ill. App., 623, 630 (1895); Chapman v. Union Mut. L. Ins. Co., 4 Ill. App., 29, 35 (1879); Ward v. Earl, 86 Ill. App., 635, 639 (1899); Berger v. Hoerner, 36 Ill. App., 360, 362 (1889); Spinney v. Barbe, 43 Ill. App., 585, 586 (1892); Sheldon v. Cook, 11 Chi. Leg. News, 76 (Ill. App., 1878); Binkley v. Forkner, 117 Ind., 176, 180 (1888); White v. Cincinnati R. & M. R. R., 71 N. E., 276 (Ind. App., 1904); Thomson v. Smith, 111 Iowa, 718, 721 (1900); Ottumwa Mill Co. v. Hawley, 44 Iowa, 57, 62 (1876); Central Branch R. R. Co. v. Fritz, 20 Kan., 430, 435 (1878); Dodge City Water Co. v. Alfalfa Land Co., 64 Kan., 247, 252 (1903); Atchison, T. & S. F. R. R. Co. v. Morgan, 42 Kan., 23 (1889); Central Branch R. R. Co. v. Fritz, 20 Kan., 430, 435 (1878); Shoemaker v. Simpson, 16 Kan., 43, 49 (1876); Cook v. Condon, 6 Kan. App., 574, 584 (1897); Clore v. Lambert, 78 Ky., 224, 226 (1879); Davis v. Eastham, 81 Ky., 116, 118 (1883); Triplett v. Mays, 13 Ky. Law R., 874, 875 (Superior Ct., 1892); Hill v. Rosenfeld, 10 Ky. Law R., 496 (Circ. Ct., 1888); Hinkley Iron Co. v. Black, 70 Me., 473, 479 (1880); Pope v. Jackson, 65 Me., 162, 166 (1876); Dudley v. Hurst, 67 Md., 44 (1887); Schaper v. Bibb, 71 Md., 145, 149 (1889); Hubbell v. East Cambridge

Bank, 132 Mass., 447, 448 (1882); Hopewell Mills v. Taunton Bank, 150 Mass., 519, 522 (1890); Leonard v. Stickney, 131 Mass., 541, 542 (1881); Smith Paper Co. v. Servin, 130 Mass., 511, 512 (1881); Aldine Mfg. Co. v. Barnard, 84 Mich., 632, 638 (1891); Higgins v. Kusterer, 41 Mich., 318, 325 (1879); Wheeler v. Bedell, 40 Mich., 693, 696 (1879); Wolford v. Baxter, 33 Minn., 12, 17 (1884); Pond Co. v. O'Connor, 70 Minn., 266, 268 (1897); Thomas v. Davis, 76 Mo., 72 (1882); State Sav. Bank v. Kercheval, 65 Mo., 682, 686 (1877); Goodin v. Elleardsville Hall Ass'n, 5 Mo. App., 289, 294 (1878); Tyler v. White, 68 Mo. App., 607, 610 (1897); Donnewald v. Turner Co., 44 Mo. App., 350, 352 (1891); Davis v. Mugan, 56 Mo. App., 311 (1893); Loan v. Gregg, 55 Mo. App., 581, 584 (1893); Freeman v. Lynch, 8 Neb., 192, 199 (1879); Hillebrand v. Nelson, 95 N. W., 1068, 1070 (Neb., 1901); Brownell v. Fuller, 60 Neb., 558, 564 (1900); Langdon v. Buchanan, 62 N. H., 657 (1883); General Electric Co. v. Transit Co., 57 N. J. Eq., 460, 470 (1898); Feder v. VanWinkle, 53 N. J. Eq., 370, 372 (1895); Speiden v. Parker, 46 N. J. Eq., 292, 293 (1889); Blancke v. Rogers, 26 N. J. Eq., 563, 567 (1875); Knickerbocker Trust Co. v. Penn Cordage Co., 58 Atl., 409 (N. J., 1904); 62 N. J. Eq., 624, 639 (1901); Fortescue v. Bowler, 55 N. J. Eq., 741, 744 (1897); Feder v. Van Winkle, 53 N. J. Eq., 370, 372 (1895); Watson v. Watson Mfg. Co., 30 N. J. Eq., 483, 487 (1879); Williamson v. New Jersey S. R. R. Co., 29 N. J. Eq., 311, 329 (1878); McMillan v. Fish, 29 N. J. Eq., 610, 612 (1878); Hughes v. Lambertville Light Co., 53 N. J. Eq., 435, 438 (1895); Roddy v. Brick, 42 N. J. Eq., 218, 224 (1886); Doughty v. Owen, 19 Atl., 540 (N. J. Ch., 1890); Erdman v. Moore, 58 N. J. Law, 445, 461 (1896); VanKeuren v. Central R. R. Co. of N. J., 38 N. J. Law, 165, 166 (1875); Jackson *ads.* Turrell, 39 N. J. Law, 329, 330 (1877); Ward v. Kilpatrick, 85 N. Y., 413, 419 (1881); McRea v. Central Bank, 66 N. Y., 489, 496 (1876); Cosgrove v. Troescher, 62 App. Div., 123, 126 (N. Y., 1901); People v. Waldron, 26 App. Div., 527 (N. Y., 1898); Richmond v. Freemans Nat. Bank, 86 App. Div., 152, 159 (N. Y., 1903); Fitzgerald v. Atlanta Ins. Co., 61 App. Div., 350, 355 (N. Y., 1901); Scobell v. Block, 89 Supr. Ct. (82 Hun), 223, 225 (N. Y., 1894); Cooper v. Harvey, 16 N. Y. Supp., 660, 662 (1891); Jermyn v. Hunter, 93 App. Div., 175 (N. Y., 1904); Phoenix Mills v. Miller, 4 N. Y. St. R., 787, 791 (Supr. Ct., 1886); Walrath v. Henderson, 6 N. Y. Wkly. Dig., 293 (Supr. Ct., 1878); Henry v. VonBrandenstein, 12 Daly, 480, 481 (N. Y. C. P., 1884); Grosz v. Jackson, 6 Daly, 463, 464 (N. Y. C. P., 1876); Causey v. Empire Mills, 119 N. C., 180, 181 (1896); Foote v. Gooch, 96 N. C., 265 (1887); Schneider v. Schneider, 6 Ohio Dec., 106, 107 (1897); Chaffee v. Fish, 2 Ohio Dec., 89, 90 (1894); Burkhardt v. Hopple, 6 Ohio Dec., 127, 128 (1897); Barker v. Cincinnati Brick Co., 4 Ohio Dec., 270, 271 (1896); *Re* George Weber Brew. Co., Ohio Prob. (Goebel), 193, 195 (Hamilton Co., 1889); Central Trust Co. v. Cincinnati Hotel Co., 26 Weekly Law Bulletin, 149 (Superior Ct. of Cincinnati, Ohio); Garven v. Hogue, 14 Wkly. Cin. Law Bul., 175, 177 (C. C., 1885); Matthiesen v. Arata, 32 Ore., 342, 346 (1897); Honeyman v. Thomas, 25 Ore., 539 (1894); Helm v. Gilroy, 20

Of these three tests, the clear tendency of modern authority seems to be to give pre-eminence to the question of intention to make the article a permanent accession to the freehold, and

Ore., 517, 522 (1891); Henkle v. Dillon, 15 Ore., 610, 614 (1888); Doscher v. Blackiston, 7 Ore., 143, 146 (1879); Alberson v. Elk Creek Min. Co., 39 Ore., 552, 559 (1901); Ritchie v. McAllister, 14 Pa. Co., 267, 269; Padgett v. Cleveland, 33 S. C., 339, 347 (1889); Johnson v. Patterson, 81 Tenn., 626, 632 (1884); Cubbins v. Ayres, 72 Tenn., 329, 331 (1880); Grewar v. Alloway, 3 Tenn. Ch., 584, 585 (1877); Keating Mach. Co. v. Marshall Power Co., 74 Tex., 605, 608 (1889); Jones v. Bull, 85 Tex., 136, 139 (1892); Phelan v. Boyd, 14 S. W., 290, 294 (Tex., 1890); Rotan Grocery Co. v. Dowlin, 77 S. W., 430 (Tex. Civ. App., 1903); Ice Co. v. Lone Star Works, 15 Tex. Civ. App., 694, 697 (1897); Willis v. Munger Mach. Co., 13 Tex. Civ. App., 677, 681 (1896); Hackett v. Amsden, 57 Vt., 432, 436 (1885); Chase v. Tacoma Box Co., 11 Wash., 377, 381 (1895); Gunderson v. Swarthout, 104 Wis., 186, 190 (1899); Homestead Land Co. v. Becker, 96 Wis., 206, 211 (1897); Walker v. Grand Rapids Mill Co., 70 Wis., 92, 96 (1887); Lipsky v. Borgmann, 52 Wis., 256, 260 (1881); Jenkins v. McCurdy, 48 Wis., 628, 629 (1879); Dowall v. Miln, 1 Sess. Cas., 4th Ser., 1180 (Scot., 1874); Chidley v. Churchwardens (1874), 32 Law T. R., 486; Keefer v. Merrill, 6 U. C. App., 121 (1881); Schreiber v. Malcolm, 8 Gr. Ch., 433 (Ont., 1860); see, also, Madison v. Madison, 206 Ill., 534, 538 (1904); Western U. T. Co. v. Burlington & Southwestern Ry. Co., 3 McCrary, 130 (U. S. C. C., Iowa, 1882); Pope v. Jackson, 65 Me., 162, 165 (1876); Stebbins v. Culbreth, 86 Md., 656, 657 (1898); Southbridge Sav. Bank v. Stevens Tool Co., 130 Mass., 547, 551 (1881); Allen v. Mooney, 130 Mass., 155, 157 (1881); Southbridge Sav. Bank v. Exeter Mach. Works, 127 Mass., 542, 545 (1879); Towne v. Fiske, 127 Mass., 125, 131 (1879); McConnell v. Blood, 123 Mass., 47, 50 (1877); Scudder v. Anderson, 54 Mich., 122, 126; Lyle v. Palmer, 42 Mich., 314, 317 (1879); Graton & Knight Co. v. Woodworth-Mason Co., 69 N. H., 177, 178 (1897); Keve v. Paxton, 26 N. J. Eq., 107, 109 (1875); Temple Co. v. Penn Mut. Ins. Co., 69 N. J. Law, 36 (1903); Pfluger v. Carmichael, 54 App. Div., 153, 154 (N. Y., 1900); *Re* Eureka Mower Co., 93 Supr. Ct. (86 Hun), 309, 312 (N. Y., 1895); Kendall v. Hathaway, 67 Vt., 122, 127 (1894); Haskin Wood Co. v. Cleveland Co., 94 Va., 439, 447 (1897); Morotock Ins. Co. v. Rodefer, 92 Va., 747, 752 (1896); Cherry v. Arthur, 5 Wash., 787, 788 (1893); Knox v. Brotherton, 14 N. S. W., Supr. Ct., 185, 189 (1875).]

In Voorhees v. McGinnis, 48 N. Y., 278, 282 (1872), the rule is stated substantially as above, and recognizes the existence of the so-called exceptional cases of constructive annexation; "those articles which are not themselves annexed, but are deemed to be of the freehold from their use and character, such as mill stones, fences, statuary and the like." See also Tifft v. Horton, 53 N. Y., 377 (1873), and cases cited in next note.

the others seem to derive their chief value as evidence of such intention.[11]

[11] Strickland v. Parker, 54 Me., 263, 266 (1866); Parsons v. Copeland, 38 Me., 537, 546 (1854); Goddard v. Bolster, 6 Me., 427 (1830); Capen v. Peckham, 35 Conn., 88 (1868); s. c., 9 Am. L. Reg. (N. S.), 136; Stockwell v. Campbell, 39 Conn., 362, 364 (1872); Alvord Carriage Man'f'g Co. v. Gleason, 36 Conn., 86 (1869); Linahan v. Barr, 41 Conn., 471 (1874); Pea v. Pea, 35 Ind., 387, 391 (1871); Crane v. Brigham, 11 N. J. Eq., 29, 35 (1855); Rogers v. Brokaw, 25 N. J. Eq., 496, 498 (1875); Snedeker v. Warring, 12 N. Y., 170, 175 (1854); Potter v. Cromwell, 40 N. Y., 287 (1869); Funk v. Brigaldi, 4 Daly, 359 (1873); McRae v. Central Natn'l Bank, 50 How. Pr., 51 (1874); Farrar v. Chauffetete, 5 Den., 527, 531 (1848); Congregational Society of Dubuque v. Fleming, 11 Iowa, 533, 536 (1861); Coddington v. Beebe, 29 N. J. Law, 550, 559 (1862); Potter v. Cromwell, 40 N. Y., 287 (1869); Weathersby v. Sleeper, 42 Miss., 732 (1869); Perkins v. Swank, 43 Miss., 349 (1870); Tate v. Blackburne, 48 Miss., 1, 6 (1873); Weston v. Weston, 102 Mass., 514, 519 (1869); Dooley v. Crist, 25 Ill., 551 (1861); Goff v. O'Conner, 16 Ill., 423 (1855); Smith v. Moore, 26 Ill., 392, 393 (1861); Ogden v. Stock, 34 Ill., 522, 527 (1864); Kelly v. Austin, 46 Ill., 156 (1867); Fortman v. Goepper, 14 Ohio St., 558, 567 (1863); Wagner v. Cleveland, etc., R. R. Co., 22 Ohio St., 563, 577 (1872); Hill v. Sewald, 53 Penn. St., 271 (1866); Meigs's Appeal, 62 Penn. St., 28 (1869); Hill v. Wentworth, 28 Vt., 428 (1856); Harris v. Haines, 34 Vt., 220, 225 (1861); Sweetzer v. Jones, 35 Vt., 317, 322 (1862); McDavid v. Wood, 5 Heisk., 95 (1871); Cannon v. Hare, 1 Tenn., Ch. 22 (1872); Seeger v. Pettit, 77 Penn. St., 437 (1875); s. c., 11 Alb. Law Jour., 151; 1 Weekly Not. Cas., 226; Shoemaker v. Simpson, Sup. Ct. of Kansas (1875); 3 Cent. Law Jour., 132; Lancaster v. Eve, 5 C. B. (N. S.), 717 (1859); s. c., 28 L. J. C. P., 235; 5 Jur. (N. S.), 683; Hellawell v. Eastwood, 6 Exch., 295, 312 (1851); Waterfall v. Penistone, 6 Ell. & B., 876, 889 (1856); Holland v. Hodgson, L. R. 7 C. P., 328, 334 (1872); Parsons v. Hind, 14 W. R., 861 (1866); Wood v. Hewitt, 8 Q. B., 916 (1846); Mant v. Collins (1841), cited in Wood v. Hewitt (*supra*). See, also, Ford v. Cobb, 20 N. Y., 348 (1859); Murdock v. Gifford, 18 N. Y., 28 (1858); Tifft v. Horton, 53 N. Y., 377 (1873); Winslow v. Merchant's Ins. Co., 4 Met., 310 (1842); Brearley v. Cox, 24 N. J. Law, 289 (1854); Hunt v. Mullanphy, 1 Mo., 508 (1825); D'Eyncourt v. Gregory, L. R., 3 Eq., 382, 396 (1866); Lawton v. Salmon, 1 H. Bl., 259, note (1782); Lancaster v. Eve, 5 C. B. (N. S.), 717 (1859); 2 Kent Com., 343; and cases cited *ante* in notes. See, however, *contra* Treadway v. Sharon, 7 Nev., 37, 42 (1871). [The following cases lay great stress upon intention as a test: Hill v. National Bank, 97 U. S., 450, 453 (1878); Langston v. State, 96 Ala., 44, 47 (1891); Nelson v. Howison, 122 Ala., 573, 578 (1898); Choate v. Kimball, 56 Ark., 55 (1892); Bemis v. First Nat. Bank, 63 Ark., 625, 629 (1897); Jordan v. Myres, 126 Cal., 565, 570 (1899); Morey v. Hoyt, 62 Conn., 542, 559 (1893); Camp v. Charles Thatcher Co., 75 Conn., 165, 170 (1902);

Watertown Steam Eng. Co. v. Davis, 5 Houston, 192, 213 (Del., 1877); Smith v. Odom, 63 Ga., 499, 503 (1879); Arnold v. Crowder, 81 Ill., 56, 58 (1876); Fifield v. Farmers Nat. Bank, 148 Ill., 163 (1893); Thielman v. Carr, 75 Ill., 385, 392 (1874); Salter v. Sample, 71 Ill., 430, 433 (1874); Baker v. McClurg, 96 Ill. App., 165, 174 (1901), aff'd 198 Ill., 28 (1902); Fifield v. Farmers Bank, 47 Ill. App., 118, 123 (1892); Ellison v. Salem Min. Co., 43 Ill. App., 120, 126 (1889); Andrews v. Chandler, 27 Ill. App., 103, 109 (1888); Chapman v. Union Mut. L. Ins. Co., 4 Ill. App., 29, 35 (1879); Jones v. Ramsey, 3 Ill. App., 303, 312 (1878); Crerar v. Daniels, 109 Ill. App., 654, 656 (1903); McKinley v. Smith, 25 Ill. App., 168, 175 (1886); Horn v. Indianapolis Nat. Bank, 125 Ind., 381, 389 (1890); Hamilton v. Huntley, 78 Ind., 521, 524 (1881); McFarlane v. Foley, 27 Ind. App., 484, 487 (1901); Johnson v. Mosher, 82 Iowa, 29, 31 (1891); West v. Farmers' Mut. Ins. Co., 117 Iowa, 147, 151 (1902); Fletcher v. Kelly, 88 Iowa, 475, 486 (1893); Neilson v. Iowa Eastern R. Co., 51 Iowa, 184, 715 (1879); Ottumwa Mill Co. v. Hawley, 44 Iowa, 57, 63 (1876); Shoemaker v. Simpson, 16 Kan., 43, 50 (1876); Commissioners of Rush County v. Stubbs, 25 Kan., 322, 325 (1881); McDonald v. Shepard, 25 Kan. 112, 115 (1881); Docking v. Frazell, 38 Kan., 420, 423 (1888); Traders Bank v. First Nat. Bank, 6 Kan. App., 400 (1897); Clore v. Lambert, 78 Ky., 224, 231 (1897); Hill v. Mundy, 89 Ky., 36, 38 (1889); Elizabethtown Coal Co. v. Elizabethtown, 13 Ky. Law R., 96 (Super. Ct., 1891); Hayford v. Wentworth, 97 Me., 347, 350 (1903); Readfield Telephone Co. v. Cyr, 95 Me., 287, 289 (1901); Lapham v. Norton, 71 Me., 83, 86 (1880); Chase v. Wingate, 68 Me., 204, 206 (1878); Ridgeway Stove Co. v. Way, 141 Mass., 557, 560 (1886); Manwaring v. Jenison, 61 Mich., 117, 134 (1886); Conrad v. Saginaw Min. Co., 54 Mich., 249, 256 (1884); Ferris v. Quimby, 41 Mich., 202, 206 (1879); Bewick v. Fletcher, 41 Mich., 625, 626 (1879); Harris v. Hackley, 127 Mich., 46, 50 (1901); Lansing Works v. Wilbur, 111 Mich., 413, 421 (1897); Coleman v. Stearns Mfg. Co., 38 Mich., 30 (1878); Beaupre v. Dwyer, 43 Minn., 485, 487 (1890); Progress Mach. Co. v. Gratiot Brick Co., 151 Mo., 501, 517 (1899); St. Louis Radiator Co. v. Carroll, 72 Mo. App., 315, 319 (1879); Cooke v. McNeil, 49 Mo. App., 81, 84 (1892); Hooven v. John Featherstone's Sons, 111 Fed., 81, 94 (U. S. C. C. A., Mo., 1901); Arlington Mill Co. v. Yates, 57 Neb., 286, 292 (1898); Freeman v. Lynch, 8 Neb., 192, 199 (1879); Brown v. Reno Power Co., 55 Fed., 229, 233 (U. S. C. C., Nev., 1893); Atlantic Trust Co. v. Atlantic City Laundry Co., 64 N. J. Eq., 140, 144 (1902); General Electric Co. v. Transit Co., 57 N. J. Eq., 460, 470 (1898); Ames v. Trenton Brewing Co., 56 N. J. Eq., 309, 322 (1897), aff'd in 57 N. J. Eq., 347 (1898); Williamson v. N. J. S. R. R. Co., 28 N. J. Eq., 277, 282 (1877); Crane Iron Works v. Wilkes, 64 N. J. Law, 193, 194 (1899); Palmateer v. Robinson, 60 N. J. Law, 433, 436 (1897); Erdman v. Moore, 58 N. J. Law, 445, 460 (1896); Pope v. Skinkle, 45 N. J. Law, 39, 41 (1883); United States Trust Co. v. Territory, 8 N. Mex., 673, 688 (1896); McRea v. Central Bank, 66 N. Y., 489, 495 (1876); New York Security Co. v. Saratoga Light Co., 95 Supr. Ct. (88 Hun), 569, 591 (N. Y., 1895); Hart v. Sheldon, 41 Supr. Ct. (34

Hun), 38 (N. Y., 1884); Rowland v. West, 69 Supr. Ct. (62 Hun), 583, 585 (N. Y., 1892); Schreyer v. Jordan, 58 N. Y. Supp., 206, 208 (1899); McLaughlin v. Lester, 4 N. Y. St. R., 852, 853 (1886); New York Life Ins. Co. v. Allison, 107 Fed., 179, 181 (U. S. C. C. A., N. Y., 1901); Siler v. Globe Glass Co., 21 Ohio Circ. Ct., 284, 286 (1900); Hyman v. Gordon, Ohio Prob., 189, 191 (1889); New Chester Water Co. v. Holly Mfg. Co., 53 Fed., 19, 29 (U. S. C. C. A., Pa., 1892), aff'g Holly Mfg. Co. v. New Chester Water Co., 48 Fed., 879, 888 (U. S. C. C., Pa., 1891); Wick v. Bredin, 189 Pa., 83, 92 (1899); Vail v. Weaver, 132 Pa., 363, 370 (1890); Advance Coal Co. v. Miller, 4 Pa. Dist., 352, 355 (1895); Silliman v. Whitmer, 11 Pa. Super., 243, 257 (1899), aff'd 196 Pa. St., 363, 365 (1900); Price v. Jenks, 14 Phila., 228, 229 (1880); Daniels v. Detwiler, 14 Montg. Co. (Pa.), 58 (1898); McLean v. Palmer, 2 Luz. Leg. Reg. R., 349, 353 (1882); Case v. L'Oeble, 84 Fed., 582, 585 (U. S. C. C., Pa., 1897); William Firth Co. v. South Carolina Loan Co., 122 Fed., 569 (U. S. C. C. A., S. C., 1903), aff'g *Re* Goldville Mfg. Co., 118 Fed., 892 (U. S. Dist. Ct., S. C., 1902); Evans v. McLucas, 15 S. C., 67, 71 (1880); Jones v. Bull, 85 Tex., 136, 139 (1892); Hutchins v. Masterson, 46 Tex., 551, 554 (1877); Moody v. Aiken, 50 Tex., 65 (1878); Orient Ins. Co. v. Parlin-Orendorff Co., 14 Tex. Civ. App., 512 (1886); Menger v. Ward, 28 S. W., 821, 824 (Tex. Civ. App., 1894); Copp v. Swift, 26 S. W., 438 (Tex. Civ. App., 1894); Deal v. Smart, 1 Tex. Ct. of App., Civ., § 1080 (1881); German Sav. Soc. v. Weber, 16 Wash., 95, 98; Rinzel v. Stumpf, 116 Wis., 287, 290 (1903); Mueller v. Chicago, M. & St. P. Ry. Co., 111 Wis., 300, 302 (1901); Fuller-Warren Co. v. Harter, 110 Wis., 80, 86 (1901); Homestead Land Co. v. Becker, 96 Wis., 206, 210 (1897); Taylor v. Collins, 51 Wis., 123, 127 (1881); Monti v. Barnes [1901], 1 K. B., 205; Norton v. Dashwood [1896], 2 Ch., 497, 500; *Re* DeFalbe [1901], 1 Ch., 523, 541; Fowler v. Fowler, 15 N. Brunsw., 488, 491 (1875); Doran v. Willard, 14 N. Brunsw., 358, 360 (1873); Burnside v. Marcus, 17 U. Can. C. P., 430 (1867); Bunnell v. Tupper, 10 U. Can. Q. B., 414, 422; Crawford v. Findley, 18 Gr. Ch., 51, 55 (Ont., 1871); McDonald v. Weeks, 8 Gr. Ch., 297 (Ont., 1860); Australian Bank v. Colonial Corp., 15 N. S. W. L. R., 464, 475 (1894); Austral Otis Co. v. Kerr, 16 Vict., 744, 746 (1890); see, also, Way v. Way, 42 Conn., 52, 54 (1875); Matzon v. Griffin, 78 Ill., 477, 480 (1875); Gunderson v. Kennedy, 104 Ill. App., 117, 119 (1902); McGorrisk v. Dwyer, 78 Iowa, 279, 282 (1889); Wentworth v. Woods Co., 163 Mass., 28, 33 (1895); Maguire v. Park, 140 Mass., 21, 27 (1885); Allen v. Woodard, 125 Mass., 400, 402 (1878); Curtis v. Leasia, 78 Mich., 480, 483 (1889); Bender v. King, 111 Fed., 60 (U. S. C. C., Mont., 1901); Erdman v. Moore, 58 N. J. Law, 445, 460 (1896); Post v. Miles, 7 N. Mex., 317, 328 (1893); Conde v. Lee, 55 App. Div., 401, 403 (N. Y., 1900), aff'd 171 N. Y., 662 (1902); Hirsch v. Graves Elevator Co., 53 N. Y. Supp., 664, 665 (1898); *Re* Welch, 108 Fed., 367 (U. S. Dist. Ct., N. Y., 1901); Cowart v. Cowart, 71 Tenn., 57, 61 (1879); Mundine v. Pauls, 28 Tex. Civ. App., 46, 51 (1902); *post*, p. *89.]

["There is such a thing as common sense, and it must be brought to bear

[*23] *But, although, if the intention is that the articles annexed shall not, by annexation, become a part of the freehold, as a general rule they will not, this rule, as it seems, must neces- [*24] *sarily be subject to a limitation which will exclude from its influence cases where the subject or mode of annexation is such that the attributes of personal property cannot be predicated of the thing in controversy.[1]

upon the question whether these * * * are or are not fixtures.'' Lindley, L. J., in Hill v. Bullock [1897], 2 Ch., 482, 483. Equitable considerations have a strong influence. Shoemaker v. Simpson, 16 Kan., 43, 50 (1876). Parts of a machine which can be removed without injury, and which are not adapted to that particular mill, may be treated either as a chattel or as a fixture as ''the justice of the case may require.'' Hudson Trust Inst. v. Carr-Curran Co., 58 N. J. Eq., 59, 70 (1899).]

In Louisiana the subject is regulated by statute (see Rev. C. C. Arts. 455, 458, 459), providing (Art. 459) that, ''things which the owner of a tract of land has placed upon it for its service and improvement are immovable by destination,'' giving examples; and ''that all such movables as the owner has attached permanently to the tenement or to the building, are likewise immovable by destination.'' Under these provisions it has been held that the double iron doors and iron lining of a brick vault, attached with plaster to the walls of a house, and to the soil by a brick foundation, and not removable without removing the brick inclosing them, and to some extent breaking the wall, are immovables by destination. Folger v. Kenna, 24 La. Ann., 436 (1872). So, mirrors set in a wall by making recesses therein, which recesses would be left in their rough state if the mirrors were removed, the mirrors being secured in their places by architraves or large wooden frames nailed to plugs of hard wood fastened in the wall, the frames of the mirrors having grooves in them corresponding to tongues in the architraves, and nails driven from one to the other to make the glass more secure, are attached permanently within Art. 459. Mackin v. Smith, 5 La. Ann., 717 (1850). Under Arts. 459 and 455 (providing that ''lands and buildings, or other constructions, whether they have their foundations in the soil or not, are immovable by their nature''), it is *held*, that a dwelling house and a gin house are immovable by nature and destination, and can not be so separated from the plantation by a transfer as to embarrass an execution levied on the plantation and improvements. Boyle v. Swanson, 6 La. Ann., 263 (1851). [Tools, lathes and machinery, permanently attached to brick and mortar, and necessary to the operation of a foundry, are immovable by destination. New Orleans Banking Co. v. Leeds, 49 La. Ann., 123 (1897).]

[1] See Ford v. Cobb, 20 N. Y., 344, 350 (1859), per Denio, J.: ''Thus, a house or other building, which from its size, or the materials of which it is constructed, or the manner in which it is fixed to the land, could not be removed without practically destroying it, would not, I conceive, become a mere chattel by means of any agreement which could be made concerning

Before proceeding further, it may be premised that in general, whether an article is a fixture or not, depends in a great degree upon the facts of each case,[2] the question [3] being a mixed

it. So of the separate materials of a building, and things fixed into the wall, so as to be essential to its support; it is impossible that they should by any arrangement between the owners become chattels.'' See also Tifft v. Horton, 53 N. Y., 377, 380 (1873); Voorhees v. McGinnis, 48 N. Y., 278, 287 (1872). In the absence of any express agreement in such a case, such a state of facts would probably afford conclusive evidence of an intention to make a permanent accession to the realty. But where the materials of such a house are valuable after the severance, no reason is perceived why, as between the immediate parties thereto, by an express agreement prior to annexation, they may not be made to retain the character of personalty. As to the removal of the materials of trade buildings, see *post* Trade Fixtures, in the chapter on Landlord and Tenant. See, also, chap. 3. [See, *post*, p. *68; also Lyle v. Palmer, 42 Mich., 314, 316 (1879); Allan v. Rowe, 1 N. Bruns. Eq. (Trueman), 41, 51 (1894); Tillman v. DeLacy, 80 Ala., 103, 105 (1885); Hendy v. Dinkerhoff, 57 Cal., 3, 6 (1880); Isham v. Morgan, 9 Conn., 374, 378 (1832); Western Union Telegraph Co. v. Burlington & S. W. Ry. Co., 11 Fed., 1 (U. S. C. C., Iowa, 1882); Horne v. Smith, 105 N. C., 322, 325 (1890). A mortgage of a steam elevator which is a chattel real, although in form a chattel mortgage, operates as a real estate mortgage as against judgment creditors of the mortgagor. Cross v. Weare Commission Co., 153 Ill., 499 (1894).]

[2] Brennan v. Whitaker, 15 Ohio St., 451 (1864); Steward v. Lombe, 1 B. & B., 506 (1820). [British & Am. Mort. Co. v. Scott, 70 Ark., 230, 232 (1901); Miller v. Waddingham, 91 Cal., 377 (1891); Morey v. Hoyt, 62 Conn., 542, 558 (1893); Apolo v. Kauo, 7 Hawaii, 755, 756 (1889); Crerar v. Daniels, 209 Ill., 296 (1904); Cook v. Condon, 6 Kan. App., 574, 582 (1897); Leonard v. Stickney, 131 Mass., 541, 543 (1881); Byrnes v. Palmer, 113 Mich., 17, 19 (1897); Capehart v. Foster, 61 Minn., 132, 135 (1895); Goodin v. Ellcardsville Hall Ass'n, 5 Mo. App., 289, 294 (1878); Loan v. Gregg, 55 Mo. App., 581, 584 (1893); Ambs v. Hill, 10 Mo. App., 108, 110 (1881); O'Brien v. Hanson, 9 Mo. App., 545, 550 (1881); Bailey v. A. Siegel Co., 54 Mo. App., 50, 55 (1893); Waters v. Reuber, 16 Neb., 99, 102 (1884); Feder v. Van Winkle, 53 N. J. Eq., 370, 372 (1895); American Brick Co. v. Drinkhouse, 59 N. J. L., 462, 464 (1896); Mutual L. Ins. Co. v. Nat. Bank of Newburgh, 25 Supr. Ct. (18 Hun), 371, 372 (N. Y., 1879); Benedict v. Marsh, 127 Pa. St., 309 (1889); Harmony Bldg. Ass'n v. Berger, 99 Pa. St., 320, 324 (1882); Kisterbock v. Todd, 16 Wkly. Notes Cas., 47 (Phila. C. P., 1885); Gulf, C. & S. F'y Co. v. Dunman, 35 S. W., 947, 948 (Tex. Civ. App., 1896); Morotock Ins. Co. v. Rodefer, 92 Va., 747, 753 (1896); *Re* Ainslie (1885), 30 Ch. D., 485, 487; Pronguey v. Gurney, 36 U. Can. Q. B., 53, 80 (1874); Reynolds v. Dechman, 2 Nova S. L. R., 459, 466 (1881); Laidlaw v. Taylor, 2 Nova S. L. R., 155, 161 (1881); see, also, Ball v. Banjamin, 73 Ill., 39, 41 (1874); Scudder v. Anderson, 54 Mich.,

[*25] *one of law and fact; but where there is no controversy about the facts, the question is one of law.[1]

With respect to the first branch of the rule above stated, it

122, 125 (1884); Reilly v. Hudson, 62 Mo., 383, 387 (1876); Sosman v. Conlon, 57 Mo. App., 25 (1894); Barber v. Roth, 19 Pa. Co., 366 (1896); *post*, p. *41, nt.]

[3] Trustees v. Grubb, 19 Leg. Int., 157; 5 Phila. R., 41 (1862); Grand Lodge v. Knox, 27 Mo., 315 (1858); Fortman v. Goepper, 14 Ohio St., 562 (1863); Campbell v. O'Neill, 64 Penn. St., 290 (1870); Steward v. Lombe, 1 B. & B., 506 (1820). [Nelson v. Howison, 122 Ala., 573, 580 (1898); Gresham v. Taylor, 51 Ala., 505, 507 (1874); Fechet v. Drake, 2 Ariz., 239 (1887); Ott v. Specht, 8 Houston (Del.), 61, 70 (1887); Smith v. Odom, 63 Ga., 499, 503 (1879); McFarlane v. Foley, 27 Ind. App., 484, 486 (1901); Howell v. Barnard, 32 Ill. App., 120, 122 (1889); Allen v. Mooney, 130 Mass., 155, 156 (1881); Wentworth v. Woods Co., 163 Mass., 28, 33 (1895); Thomas v. Wagner, 92 N. W., 106 (Mich., 1902); Ambs v. Hill, 13 Mo. App., 585; Insurance Co. of No. Am. v. Buckstaff, 92 N. W., 755, 756 (Neb., 1902); Graton & Knight Co. v. Woodworth-Mason Co., 69 N. H., 177, 178 (1897); Pope v. Skinkle, 45 N. J. Law, 39, 40 (1883); VanKeuren v. Central R. R. of N. J., 38 N. J. Law, 165, 166 (1875); Scobell v. Block, 89 Supr. Ct. (82 Hun), 223, 224 (N. Y., 1894); Bridges v. Thomas, 8 Okla., 620, 623 (1899); Alberson v. Elk Creek Min. Co., 39 Ore., 552, 559 (1901); Matthiesen v. Arata, 32 Ore., 342, 346 (1897); Honeyman v. Thomas, 25 Ore., 539, 543 (1894); National Bank v. North, 160 Pa. St., 303 (1894); Silliman v. Whitmer, 11 Pa. Super., 243, 266 (1899), aff'd 196 Pa. St., 363, 365 (1900); Padgett v. Cleveland, 33 S. C., 339, 345 (1889); Gulf, &c., R'y Co. v. Dunman, 85 Tex., 176, 182 (1892); Missouri Pac. R'y Co. v. Cullers, 81 Tex., 382, 390 (1891); Stell v. Paschal, 41 Tex., 640, 645 (1874); Mundine v. Pauls, 28 Tex. Civ. App., 46, 50 (1902); Dunman v. Gulf, &c., R'y Co., 26 S. W., 304, 305 (Tex. Civ. App., 1894); Tunis Lumber Co. v. Denis Lumber Co., 97 Va., 682, 689 (1899); Philadelphia Mort. Co. v. Miller, 20 Wash., 607, 610 (1899); German Sav. Soc. v. Weber, 16 Wash., 95, 98 (1896); Lipsky v. Borgman, 52 Wis., 256, 258 (1881); Monti v. Barnes [1901], 1 K. B., 205, 207; Masefield v. Rotana, 10 N. Z., 169, 173 (1891); see, also, Brooks v. Prescott, 114 Mass., 392, 396 (1874); and, *post*, p. *94.]

[1] Fullam v. Stearns, 30 Vt., 452 (1857); Steward v. Lombe, 1 B. & B., 506 (1820). See, also, Seeger v. Pettit, 77 Penn. St., 437 (1875). [Royce v. Latshaw, 15 Colo. App., 420 (1900); Myrick v. Bill, 3 Dak., 284, 291 (1883); Commonwealth v. Bruce, 79 Ky., 560, 561 (1881); Hill v. Rosenfeld, 10 Ky. Law R., 496 (Circ. Ct., 1888); Hopewell Mills v. Taunton Bank, 150 Mass., 519, 522 (1890); Jenks v. Colwell, 66 Mich., 420, 430 (1887); Harris v. Hackley, 127 Mich., 46, 49 (1901); Bartlett v. Haviland, 92 Mich., 552, 555 (1892); St. Louis Radiator Co. v. Carroll, 72 Mo. App., 315, 318 (1897); John O'Brien Boiler Co. v. Haydock, 59 Mo. App., 653, 660 (1894); Ward v. Kilpatrick, 85 N. Y., 413, 417 (1881); Bradley v. Ritchie, 12 Pa.

is believed that the definition of the word "annexation," by Mr. Ferard (page 2), as requiring that the article in question should be let into or united to the land, or to some substance previously connected with the land, or that the soil shall have been displaced for the purpose of receiving the article, or that the chattel should be cemented or otherwise fastened to some fabric previously attached to the ground, is entirely too narrow. In many of the cases, and especially in cases between landlord and tenant, the fact that the article in question is simply laid upon the land and brought into contact with it without any more intimate connection with the realty, considered in connection with the relation existing between the parties, furnishes satisfactory and conclusive evidence of an intention on the part of the party erecting the structure not to make it a permanent accession to the freehold, or even that it should retain entire its character as a chattel. But in other cases[2] *the relation [*26] of the parties and the policy of the law in relation thereto, the

Dist., 658, 661 (1903); Harris v. Kelly, 13 Atl., 523, 527 (Pa., 1888); Jenkins v. McCurdy, 48 Wis., 628, 629 (1879); Burnside v. Marcus, 17 Up. Can. C. P., 430, 441 (1867); Bunnell v. Tupper, 10 Up. Can. Q. B., 414, 417; see, also, Moore v. Moran, 64 Neb., 84, 87 (1902); New York Life Ins. Co. v. Allison, 107 Fed., 179, 186 (U. S. C. C. A., N. Y., 1901). See, however, Brownell v. Fuller, 60 Nebr., 558, 566 (1900).]

[Where the evidence is exceedingly meagre but it appears that the master has visited the factory, and has seen each machine and the mode of its attachment, there is a strong presumption in favor of his findings; and they must be assumed to be correct unless the evidence shows that they are wrong. Southbridge Bank v. Mason, 147 Mass., 500 (1888).]

[Where a statute provides that, in event of total loss of real property, the amount named in the insurance policy covering same shall be conclusive as to the true value thereof, it is not competent for insurance companies to avoid their liability by agreement with the owner to denominate it personal property, when, by law, it would be denominated real property. Havens v. Germania Ins. Co., 123 Mo., 403, 421 (1894).]

[Where the burden of proof is upon the party claiming that an article is a chattel, and he offers no evidence, there is no question for the jury. Reynolds v. Ashby [1903], 1 K. B., 87.]

[2] This subject is so well considered in Snedeker v. Warring, 12 N. Y., 170 (1854), as to warrant the presentation of the material portions of the case at the end of this note.

Snedeker v. Warring was approved in Wadleigh v. Janvrin, 41 N. H., 503, 517 (1860); Strickland v. Parker, 54 Me., 263, 266 (1866). See, also, Ogden v. Stock, 34 Ill., 522 (1864); Bainway v. Cobb, 99 Mass., 457 (1868);

Rogers v. Crow, 40 Mo., 91 (1867); D'Eyncourt v. Gregory, L. R., 3 Eq., 382, 396 (1866).

See, however, Grady Fixt. (2d Ed.), 144.

Rails laid into a fence upon land are a part of the freehold, even though not otherwise attached to the land than by their weight alone. Boon v. Orr, 4 G. Greene, 304 (1854); Smith v. Carroll, 4 G. Greene, 146 (1853); Seymour v. Watson, 5 Blackf., 555 (1841); Burleson v. Teeple, 2 G. Greene, 542 (1850); Mitchell v. Billingsley, 17 Ala., 391 (1850). [Bagley v. Columbus S. R'y Co., 98 Ga., 626; Emrich v. Ireland, 55 Miss., 390, 402 (1877); Hannibal & St. Jo. R. R. Co. v. Crawford, 68 Mo., 80, 82 (1878); Kimball v. Adams, 52 Wis., 554, 556 (1881).]

[Likewise, a church organ. Chapman v. Union Mut. L. Ins. Co., 4 Ill. App., 29, 35 (1879).]

[Likewise an iron table weighing thirty-three tons resting upon a brick and stone foundation in a glass factory. Smith Paper Co. v. Servin, 130 Mass., 511, 512 (1881); crates, capping machines and work tables in a canning factory. Dudley v. Hurst, 67 Md., 44, 51 (1887); a tank of the capacity of two hundred and fifty barrels upon a foundation of earth and lumber. Parker Com. v. Reddick, 18 Ind. App., 616, 619 (1897); a large cask in a brewery. Meyer v. Orynski, 25 S. W., 655, 657 (Tex. Civ. App., 1894); "dog grates" of considerable weight replacing fixed grates. Monti v. Barnes [1901], 1 K. B., 205; a six horse power steam engine and boiler resting upon wheels upon the ground. "By the law of gravitation it becomes affixed to the spot where it was placed." Hart v. Sheldon, 41 Supr. Ct. (34 Hun), 38, 44 (N. Y., 1884); Brand v. Brand (1878), 5 Sess. Cas., 4th Ser., 607.]

[A house, even though attached to land not otherwise than by its own weight, is necessarily looked at from a somewhat different point of view as regards the question of annexation to the land than a piece of machinery or other weighty article, which is itself constructed as a mere distinct chattel. Miles v. Ankatell, 25 Ont. App., 458, 460 (1898).]

[In regard to annexation by weight alone, see, also, Leonard v. Stickney, 131 Mass., 541, 543 (1881).]

So much of the case of Snedeker v. Warring as relates to the subject under consideration, is as follows: Appeal from the Supreme Court. James Thom, the sculptor, owning a farm in Rockland county, in the year 1842 mortgaged it to Crum, and subsequently erected thereupon a dwelling house, built in the Gothic style, of red stone, and a sun-dial; and placed upon a base in the lawn in front of the house, a colossal statue of Washington. In 1849, the farm and its appurtenances were sold to defendant, upon a foreclosure of said mortgage, who took possession of the premises, the dial and statue still remaining where originally erected. After the erection of the dial and statue, Thom made a second mortgage upon the farm, which mortgage came to the defendant by assignment at the time of his purchase of the premises, at the sale under the first mortgage. The sheriff of Rockland county, in 1847, sold the dial and statue to the plaintiff as personalty, upon an execution issued on a judgment rendered against Thom, and the defend-

ant having refused the plaintiff permission to remove the dial and statue, he brought this action to recover their value. On the trial the above facts were proved, and also that the dial was three or four feet in height, supported upon a block of red stone in the form of a pedestal at the bottom, and square at the top, the intervening part being shaped like a column, and eighteen inches in diameter in the middle, and eight at each end. This pedestal rested on a flag covering a well, from which water was conducted by under-ground pipes to the house. The block of stone supporting the dial was kept in position on the flag by its weight alone, which was about two hundred pounds.

It also appeared that the statue and its pedestal, weighing between three and four tons, were made from a single block of red stone, of the same color as the block supporting the dial, and the stone composing the house. In the centre of a mound, raised about three feet above the natural surface of the ground, a foundation for the base of the statue was built, composed of rough stone laid up without mortar; and upon this foundation, the top of which was below the surface of the mound, a base was built for the statue composed of square blocks of stone, of similar color to that composing the statue and its pedestal. This base, which rose about three feet above the surface of the mound, was of a square form, but not laid up with mortar or cement, or fastened in any way (except that the joints were pointed with cement); and corresponded with the pedestal of the statue supported by it. The whole height of the statue and base was about twelve feet. The statue was not in any way secured to the base, which was made expressly for it, excepting by its weight, and had never been removed from its position since it was placed there some six or seven years before the trial, nor had it caused the base or foundation to settle or give way. Mr. Thom testified in behalf of the plaintiff, that he intended to sell the statue, and placed it upon the base to remain there only till he could sell it; which last evidence was objected to by defendant, and exception taken to the ruling admitting it.

"PARKER, J. The facts in this case are undisputed, and it is a question of law whether the statue and sun-dial were real or personal property. The plaintiffs claim they are personal property, having purchased them as such under an execution against Thom. The defendant claims they are real property, having bought the farm on which they were erected, at a foreclosure sale under a mortgage, executed by Thom before the erection of the statue and sun-dial, and also as mortgagee in possession of another mortgage, executed by Thom after their erection. * * * *

"No case has been found in either the English or American courts, deciding in what cases statuary placed in a house or in grounds shall be deemed real, and in what cases personal property. This question must therefore be determined upon principle. All will agree that statuary exposed for sale in a workshop, or wherever it may be before it shall be permanently placed, is personal property; nor will it be controverted that where statuary is placed upon a building, or so connected with it, as to be considered part of it, it will be deemed real property, and pass with a deed of the land. But the doubt in this case arises from the peculiar position and character of this

statue, it being placed in a court yard before the house, on a base erected on an artificial mound raised for the purpose of supporting it. The statue was not fastened to the base by either clamps or cement, but it rested as firmly on it by its own weight, which was three or four tons, as if otherwise affixed to it. The base was of masonry, the seams being pointed with cement, though the stones were not laid in either cement or mortar; and the mound was an artificial and permanent erection, raised some two or three feet above the surrounding land, with a substantial stone foundation.

"If the statue had been actually affixed to the base by cement or clamps, or in any other manner, it would be conceded to be a fixture, and to belong to the realty. But as it was, it could have been removed without fracture to the base on which it rested. But is that circumstance controlling? A building of wood, weighing even less than this statue, but resting on a substantial foundation of masonry, would have belonged to the realty. A thing may be as firmly affixed to the land by gravitation as by clamps or cement. Its character may depend much upon the object of its erection. Its destination, the intention of the person making the erection, often exercise a controlling influence, and its connection with the land is looked at principally for the purpose of ascertaining whether that intent was that the thing in question should retain its original chattel character, or whether it was designed to make it a permanent accession to the lands.

"By the civil law, columns, figures and statues, used to spout water at fountains, were regarded as immovable, or real (Pandects, lib. 19, tit. 1, §17, vol. 7, by Pothier, 107), though it was inferred that statues resting on a base of masonry were not immovable, because they were there, not as a part of the construction, but as ornaments. (Corp. Juris. Civ., by Kreigel, lib. 19, tit. 1, §17; Poth., Pand., 109; Burrill's Law Dic., "Affixus"). But Labeo held the rule to be "*ea quae perpetui usus causa in aedificiis sunt aedificii esse; quae vero ad praesens, non esse aedificii;*" thus making the kind of property depend upon the question whether it was designed by the proprietor to be permanent or temporary; or, as it was generally called by civilians, "its destination." (Corp. Jur. Civ., by Kreigel, lib. 19, tit. 1, §17.)

"And Pothier says that when, in the construction of a large vestibule or hall, niches are made, the statues attached ("attachees") to those niches, make part of the house, for they are placed there *ad integrandam domum.* They serve to complete that part of the house. Indeed, the niches being made only to receive the statues, there will fail to be any thing in the vestibule without the statues; and he says, it is of such statues that we must understand what Papinianus says: "*Sigilla et statuae affixae, instrumento domus non continentur, sed domus portio sunt.*" (Pothier de Communaute, § 56.)

"By the French law, statues placed in a niche made expressly to receive them, though they could be removed without fracture or deterioration, are immovable, or part of the realty. (Code Nap., § 525.) But statues standing on pedestals in houses, court-yards and gardens, retain their character of "movable" or personal. (3 Touillier, Droit Civil de France, 12.) This

has reference to statues only which do not stand on a substantial and permanent base, or separate pedestal made expressly for them. For when a statue is placed on a pedestal or base of masonry constructed expressly for it, it is governed by the same rule as when placed in a niche made expressly to receive it, and is immovable (2 Repertoire Generale, Journal du Palais, by Ledru Rollin, 518, § 139). The statue in such case is regarded as making part of the same thing with the permanent base upon which it rests. The reasons for the French law upon this subject are stated by the same author in the same work, page 517, § 129, where the rule is laid down with regard to such ornaments as mirrors, pictures and statues, that the law will presume the proprietor intended them as immovable when they cannot be taken away without fracture or deterioration, or leaving a gap or vacancy. A statue is regarded as integral with the permanent base on which it rests, and which was erected expressly for it, when the removal of the statue will offend the eye by presenting before it a distasteful gap (''*vide choquant*''), a foundation and base no longer appropriate or useful. (Id., § 139.) Things immovable by destination are said to be those objects movable in their nature, which, without being actually held to the ground, are destined to remain there perpetually attached for use, improvement or ornament. (2 Ledru Rollin, Repertoire Generale, 514, § 30.)

''I think the French law, as applicable to statuary, is in accordance with reason and justice. It effectuates the intention of the proprietor. No evidence could be received more satisfactory of the intent of the proprietor to make a statue a part of his realty, than the fact of his having prepared a niche or erected a permanent base of masonry expressly to receive it; and to remove a statue from its place under such circumstances, would produce as great an injury, and do as much violence to the freehold, by leaving an unseemly and uncovered base, as it would have done if torn rudely from a fastening by which it had been connected with the land. The mound and base in this case, though designed in connection with the statue as an ornament to the grounds, would, when deprived of the statue, become a most objectionable deformity.

''There are circumstances in this case, not necessary under the French law, to indicate the intention to make the statue a permanent erection, but greatly strengthening the presumption of such intent. The base was made of red sand stone, the same material as the statue, giving to both the statue and base the appearance of being but a single block, and both were also of the same material as the house. The statue was thus peculiarly fitted as an ornament for the grounds in front of that particular house. It was also of colossal size, and was not adapted to any other destination than a permanent ornament to the realty. The design and location of the statue were in every respect appropriate, in good taste, and in harmony with the surrounding objects and circumstances.

''I lay entirely out of view in this case the fact that Thom testified that he intended to sell the statue when an opportunity should offer. His secret intention in that respect can have no legitimate bearing on the question. He clearly intended to make use of the statue to ornament his grounds,

when he erected for it a permanent mound and base; and a purchaser had a right so to infer, and to be governed by the manifest and unmistakable evidences of intention. It was decided by the court of cassation in France, in Hornelle v. Enregistr. (2 Ledru Rollin, Journal du Palais, Repertoire, etc., 214), that the destination which gives to movable objects an immovable character, results from facts and circumstances determined by the law itself, and could neither be established nor taken away by the simple declarations of the proprietor, whether oral or written. There is as much reason in this rule as in that of the common law, which deems every person to have intended the natural consequences of his own acts.

"There is no good reason for calling the statue personal because it was erected for ornament only, if it was clearly designed to be permanent. If Thom had erected a bower or summer house of wicker work, and had placed it on a permanent foundation in an appropriate place in front of his house, no one would doubt it belonged to the realty; and I think this statue as clearly belongs to the realty as a statue would, placed on the house, or as one of two statues placed on the gate posts at the entrance to the grounds.

"An ornamental monument in a cemetery is none the less real property because it is attached by its own weight alone to the foundation designed to give it perpetual support.

"It is said the statues and sphinxes of colossal size which adorn the avenue leading to the temple of Karnak, at Thebes, are secured on their solid foundations only by their own weight. Yet that has been found sufficient to preserve many of them undisturbed for four thousand years (Taylor's Africa, 113 et seq.); and if a traveler should purchase from Mehemet Ali the land on which these interesting ruins rest, it would seem quite absurd to hold that the deed did not cover the statues still standing, and to claim that they were the still unadministered personal assets of the Ptolemies after an annexation of such long duration. No legal distinction can be made between the sphinxes of Thebes and the statue of Thom. Both were erected for ornament, and the latter was as colossal in size and as firmly annexed to the land as the former, and by the same means.

"I apprehend the question, whether the pyramids of Egypt or Cleopatra's Needle are real or personal property, does not depend on the result of an inquiry by the antiquarian whether they were originally made to adhere to their foundations with wafers, or sealing wax, or a handful of cement. It seems to me puerile to make the title to depend upon the use of such, or of any other, adhesive substances, when the great weight of the erection is a much stronger guaranty of permanence.

"The sun-dial stands on a somewhat different footing. It was made for use as well as for ornament, and could not be useful except when firmly placed in the open air and in the light of the sun. Though it does not appear that the stone on which it is placed was made expressly for it, it was appropriately located on a solid and durable foundation. There is good reason to believe it was designed to be a permanent fixture, because the material of which it was made was the same as that of the house and the statue, and because it was in every respect adapted to the place.

massiveness and permanent nature of the structure, *ap- [*27] propriation or adaptation to the use or purpose of that part of the realty with which it connected, and other attendant circum- *stanees furnish equally conclusive evidence of an inten- [*28] tion to make the erection a permanent accession to the freehold, not*withstanding it may not be cemented or otherwise [*29] fastened to the realty than by its weight alone, and under such circumstances the erection ought to be considered parcel of the realty. *This distinction, and the rule stated above, it is [*30] believed will reconcile many of the cases otherwise apparently irreconcilable, or will at least place the subject upon a more rational basis.

The subject is well considered by the Court of Exchequer Chamber, in Holland v. Hodgson,[1] Blackburn, J., delivering the opinion of the court. "The present case is, therefore, really, though not in form, an appeal against the decision of the Court of Queen's Bench in Longbottom v. Berry,[2] and was so argued. There is no doubt that the general maxim of law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what consti- *tutes an annexation sufficient for this purpose. It is a [*31] question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz., the degree of annexation and the object of the annexation. When the article in question is no further attached to the land than by its own weight, it is generally to be considered a mere chattel; see Wiltshear v. Cottrell,[3] and the cases there cited. But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land;

"My conclusion is, that the facts in the case called on the judge of the circuit to decide, as a matter of law, that the property was real, and to nonsuit the plaintiff; and if I am right in this conclusion, the judgment of the Supreme Court should be reversed.

"GARDINER, C. J., and RUGGLES, SELDEN, ALLEN and EDWARDS, Js., concurred in the conclusions of the foregoing opinions.

"JOHNSON, J. (Dissenting)." * * * *

[1] L. R., 7 C. P., 328, 334 (1872). [See Chidley v. Churchwardens of West Ham. (1874), 32 Law T. R., 486.]

[2] L. R., 5 Q. B., 123 (1869).

[3] 1 E. & B., 674 (1853); s. c., 22 L. J. Q. B., 177.

see D'Eyncourt v. Gregory.[4] Thus blocks of stone placed one on the top of another without any mortar or cement, for the purpose of forming a dry stone wall, would become part of the land, though the same stones, if deposited in a builder's yard, and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels. On the other hand, an article may be very firmly fixed in the land, and yet the circumstances may be such as to shew that it was never intended to be part of the land, and then it does not become part of the land. The anchor of a large ship must be very firmly fixed in the ground in order to bear the strain of the cable, yet no one could suppose that it became part of the land, even though it should chance that the ship-owner was also the owner of the fee of the spot where the anchor was dropped.[5] An anchor similarly fixed in the soil for the purpose of bearing [*32] *the strain of the chain of a suspension bridge, would be part of the land. Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight, are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the

[4] L. R., 3 Eq., 382 (1866).

[5] A floating dock floated to within 12 feet of a pier, and there so fastened to the pier that its only motion is to rise and fall with the tide, is not a fixture within a statute providing "that any addition erected to a former building, or any fixed machinery or gearing, or other fixtures for manufacturing purposes, shall be considered as a building for the purposes of this act, but no building shall be subject to the provisions of this act for any debt contracted for repairs done thereto, or alterations made therein." Coddington v Dry Dock Co., 31 N. J. Law, 477 (1863). Neither is it a building within the meaning of a statute (Nix., Dig., 487), giving a lien for labor and materials expended thereon, upon every building erected or built within the State and on the land whereon it stands, including the curtilage wherein the same is erected. Coddington v. Dry Dock Co., *supra.* See *contra,* Olmstead v. McNall, 7 Blackf., 387 (1845); Gallbreath v. Davidson, 25 Ark., 490 (1869). [A dry dock securely and permanently moored to the bank for more than fourteen years, partakes more of the nature of a fixture attached to the realty than of a boat, and is not a subject for salvage service. Cope v. Vallette Dry Dock Co., 16 Fed., 924, 925 (U. S. C. C., La., 1883). A wharf-boat is a part of the wharf to which it is attached, and a landing at the wharf-boat is a landing at the wharf so far as the liability of the owner is concerned. Davis v. Reamer, 105 Ind., 318, 322 (1885).]

land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land, even slightly, is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel.[6] This last proposition seems to be in effect the basis of the judgment of the Court of Common Pleas, delivered by Maule, J., in Wilde v. Waters.[7] This, however, only removes the difficulty one step, for it still remains a question in each case whether the circumstances are sufficient to satisfy the onus. In some cases, such as the anchor of the ship, or the ordinary instance given of a carpet nailed to the floor of a room, the nature of the thing sufficiently shews it is only fastened as a chattel temporarily, and not affixed permanently as part of the land. But ordinary trade or tenant fixtures, which are put up with the intention that they shall be removed by the tenant (and so are put up for a purpose in one sense only temporary, and certainly not for the purpose of improving the reversionary interest of the landlord), have always been considered as part of the land, though severable by the tenant. In most, if not all, of such cases, the reason why the articles are considered fixtures, is probably that indicated by Wood, V. C., in Boyd v. Shorrock,[8] that the tenant indicates by the mode in which he put them up, that he regards them as attached to the property during his interest in that property."

*III. Constructive Annexation. [*33]

With regard to the subject of constructive annexation, it is easier to furnish examples than to give an accurate definition of the term. Thus, the keys, doors, windows, etc., of a house, although they are in one sense distinct things, yet are part of the freehold, and accordingly they go to the heir as part of the inheritance, and pass by a conveyance or devise of the house.[9]

[6] As to the varying presumption as to intention, see *post*, under the head landlord and tenant, vendor and vendee, etc.

[7] 16 C. B., 637 (1855); s. c., 24 L. J., C. P., 193.

[8] L. R., 5 Eq., 78 (1867).

[9] See Liford's Case, 11 Co., 50 b (1614); Com. Dig. Biens B; Godolph. pt.

So in Wystow's (or Wistow's) case of Gray's Inn[10] it was resolved that if a man has a horse mill, and the miller takes the mill stone out of the mill to pick it, in order to make it grind the better, although it is actually severed from the mill, yet it remains parcel thereof, as if it had always been lying upon the other stone, and accordingly it will pass by a lease or conveyance of the mill.[11]

The iron rolls and floor in Voorhis v. Freeman,[12] and Pyle v. Pennock,[13] heretofore cited, would seem to have been proper cases for the application of the doctrine of constructive annexation, though the cases were decided upon another ground.

So mill saws and leather belting, purchased by the owner of a saw mill for use therein, and which have been attached and used as a part of the mill without any intention at the time of removing them, and which are essential parts of the mill, become and remain parts of the realty, though temporarily sev- [*34] *ered and stored in the file room adjoining the mill.[14]

2 ch. 14, § 1; Cook's Case, Mo., 177 (1581); Shep. Touch., 470; Regina v. Wheeler, 6 Mod., 187 (1704); Rex v. Crosse, 1 Sid., 207 (1675); Tomlinson v. White, Barnes, 93 (1735); Bishop v. Elliott, 11 Exch., 113 (1855); s. c., 1 Jur. (N. S.), 962; 24 L. J. (N. S.) Exch., 229. [Geirke v. Schwartz, 45 N. Y. Supp., 928 (1897); plates and papers used with a press. Crawford v. Findlay, 18 Gr. Ch., 51, 54 (Ont., 1871); watchman's clock in a factory. Haggert v. Brampton, 28 Can., 174, 182 (1897); an alarm-bell in the tower of a city fire engine house. Harrisburg v. Hope Fire Co., 2 Pearson, 269, 271 (Pa., 1876); an ice-house with the ice therein. Hill v. Mundy, 89 Ky., 36 (1889); scenery. Security Tr. Co. v. Temple Co., 58 Atl., 865 (N. J. Ch., 1904).]

[10] 14 Hen. 8, 25 b (1522), cited in Liford's Case, 11 Co. 50 b. Wystow's Case will be found translated in 4 Man. & Ry., 280, note (g).

[11] See, also, Regina v. Wheeler, 6 Mod., 187 (1704); Walmsley v. Milne, 7 C. B. (N. S.), 115 (1859); s. c., 6 Jur. (N. S.), 125; 29 L. J. C. P., 97; 1 L. T. (N. S.), 62; 8 Am. Law Reg., 373. [See Grimshawe v. Burnham, 25 Up. Can., Q. B., 147 (1865).]

[12] 2 W. & S., 116 (1841).

[13] Id. 390 (1841); see, also, *Ex parte* Astbury, L. R. 4 Ch. App., 630 (1869); Metropolitan Counties, etc., Society v. Brown, 26 Beav., 454 (1859); Fisher v. Dixon, 12 Cl. & Fin., 312 (1845).

[14] Burnside v. Twitchell, 43 N. H., 390 (1861); see, also, Wadleigh v. Janvrin, 41 N. H., 503 (1860); *Ex parte* Astbury (*supra*); Bliss v. Misner, 4 N. Y. Supreme Ct. R., 633 (1874). [Duplicate machinery for emergencies. Delaware, L. & W. R. R. Co. v. Oxford Iron Co., 36 N. J. Eq., 452, 456 (1883).]

The cases on this subject are very similar in principle, and will be found referred to in the notes below.

In order to constitute a constructive annexation to the realty, the article in question, though not physically connected therewith, must not only be appropriated or adapted, and accessory to the fit and beneficial use of the principal thing, the realty, and not to a matter of a mere personal nature, but must also be such as goes to complete the building, machinery, etc., constituting the principal thing which is affixed to the land, and must be such as, if removed, would leave the principal thing incomplete and unfit for use, and would not itself alone be equally useful and adapted for general use elsewhere.[15] In respect to all cases of constructive annexation, there exists both adaptation to the enjoyment of the land and localization in use, as obvious elements of distinction from mere chattels personal.[16]

This point has undergone considerable discussion with reference to the cars, locomotives, and other rolling stock of railroads, and considerable difference of opinion has hitherto existed on the subject.

Some of the cases carrying out the rule as to adaptation to be used with, and being essential to, the beneficial enjoyment of the real estate to its logical results, have decided such rolling stock to be a part of the realty; and have accordingly held that rolling stock, consisting of cars, locomotives, etc., are fixtures,

[15] See Beardsley v. Ontario Bank, 31 Barb., 632 (1859). [Winslow v. Bromich, 54 Kan., 300, 306 (1894); Hill v. Mundy, 89 Ky., 36 (1889); Dudley v. Hurst, 67 Md., 44, 50 (1887); Wolford v. Baxter, 33 Minn., 12, 18 (1884); Dana v. Burke, 62 N. H., 627, 629 (1883); see, also, Watertown Steam Engine Co. v. Davis, 5 Houston (Del.), 192, 214 (1877); Giddings v. Freedley, 128 Fed., 355, 359 (U. S. C. C. A., Vt., 1904).]

[16] Hoyle v. Plattsburgh, &c., R. R. Co., 54 N. Y., 314, 323 (1873).

[Where vaults are excavated for the special purpose of storing casks for holding beer, and casks are placed therein upon a platform, but the vault was not excavated in any special shape to suit these particular casks, nor were the casks constructed to fit into any particular place, but might be sold to other brewers for similar use, there is no constructive annexation. There is no difference between them and ordinary beer kegs, except they were used exclusively inside the vault, and were larger and more difficult to be moved. Wolford v. Baxter, 33 Minn., 12, 19 (1884).]

[A pleasure boat, built for use in connection with a summer cottage, and stored upon the premises, is not constructively annexed so as to pass under a devise of the cottage-grounds. Dana v. Burke, 62 N. H., 627 (1883).]

and pass by a mortgage of the track or roadway.[17] In [*35] *Farmers' Loan & Trust Co. v. Hendrickson, the question for the judgment of the court was, whether the judgment creditors of the Flushing Rail Road Co., by virtue of their several judgments and executions, and the levies made by the sheriff, acquired a lien upon the rolling stock levied on as the property of said company, superior in law to the claim of the plain-

[17] See Farmers' Loan & Trust Co. v. Hendrickson, 25 Barb., 484 (1857); Palmer v. Forbes, 23 Ill., 301, 312 (1860); Farmers' Loan & Trust Co. v. St. Jo., etc., R'w'y. Co., 3 Dill., C. C., 412 (1875). See, also, Brown Fixt., § 76a; Pennock v. Coe, 23 How., 117 (1859); Pierce v. Emery, 32 N. H., 484 (1856); Minnesota Co. v. St. Paul Co., 2 Wall., 646, note (1864); Hunt v. Bullock, 23 Ill., 320 (1860). [Mich. Cent. R. R. Co. v. Chi. & Mich. L. S. R. R. Co., 1 Ill. App., 399, 409 (1878); Ontario Car Co. v. Farwell, 18 Can., 1 (1890). A distinction is made between the rolling stock of an ordinary steam railway, which may be hauled thousands of miles from home, and an electric railway car, which is part of one great machine, operated by means of a continuous current of electricity generated in the power house, and passing by an overhead wire, down a trolley-pole through the car to the rails, and incapable of use when detached from the rails. Kirkpatrick v. Cornwall Street R'y Co., 2 Ont. Law, 113, 123 (App., 1901). Wheels and axles upon which lumber is placed for the purpose of being run through a dry kiln, such dry kiln having been especially constructed for the use of the wheels, and useless for any other purpose without alteration, and such wheels having been fitted to a wooden tramway running clear through the dry kiln and of little value apart from the dry kiln, are constructively attached to the building. Meek v. Parker, 63 Ark., 367, 371 (1897). Cars used in a brick yard to carry bricks from the molds into the drier, are realty. Curran v. Smith, 37 Ill. App., 69 (1890). In Central Tr. Co. v. Sheffield Coal R'y Co., 42 Fed., 106, 110 (U. S. C. C., Ala., 1890), a mechanics' lien was allowed for coal cars for a mine. In some states rolling stock is, by statute, made a part of the realty. See Central Trust Co. v. Moran, 56 Minn., 188, 193 (1894); Railroad Co. v. James, 73 U. S., 750, 751 (1867).] So, in Titus v. Mabee, 25 Ill., 257 (1861), it was held that a freight car on the road, side-track or turn-table of the company, was realty, and not subject to levy and sale on execution as personalty. This case was followed and approved by Titus v. Ginheimer, 27 Ill., 462 (1861). [Barker v. Central Vermont R'y Co., 14 Que., C. S., 467, 470 (1898); Grand Trunk R'y Co. v. Eastern Townships' Bank, 16 Lower Can., 173, 175 (1865).] See, however, Sangamon, etc., R. R. Co. v. Morgan, 14 Ill., 163 (1852). [Where by statute of Vermont, cars pass under a mortgage of the road, they can not be seized on execution in Quebec, although the cars were in Quebec at the time the mortgage was executed in Vermont. Baker v. Central Vermont R'y, 4 Revue de Juris., 454 (1898). Regulated by statute. Central Trust Co. v. Moran, 56 Minn., 188, 192 (1894).]

tiffs under and by virtue of prior mortgages of the track or roadway, executed by the said company. The opinion of the court was delivered by Strong, P. J.: "That railway cars are a necessary part of the entire establishment, without which it would be inoperative and valueless, there can of course be no doubt. Their wheels are fitted to the rails; they are constantly upon the rails, and, except in cases of accidents, or when taken off for repairs, nowhere else; they are not moved off the land belonging to the company; they are peculiarly adapted to the use of the railway, and in fact can not be applied to any other purpose; they are not, like farming utensils, and possibly the machinery in factories, and many of the movable appliances to stores and dwellings, the objects of general trade; they are permanently used on the particular road where they are employed, and are seldom, if ever, changed to any other. Many of these are strong characteristics of the realty; some of them have often been deemed conclusive. * * * It is true that no mechanical or agricultural business can be carried on to much extent without tools or farming implements, and such tools and implements are universally conceded to be personal property; but then such tools or implements are not peculiarly adapted or confined to any particular establishment, but may be used upon them generally, and are subjects of frequent barter. It is difficult, I admit, as to the stationary machinery in a factory, and articles of a similar character in a dwelling house, which are not absolutely fastened; but although they are considered as personal property for reasons peculiar to them, and not of universal application, yet *such reasons do not seem to me sufficient, while many [*36] things become fixtures without physical annexation.

"If railway cars were used in any other place than upon the lands belonging to the company, or for any other purpose than in the transaction of its business, or were constructed in such shape and so extensively as to become objects of general trade, or were not a necessary part of the entire establishment, I might consider myself as compelled by the weight of authority to decide, that as they are not physically annexed to what is usually denominated real estate, they must be deemed personal property. But as each and all of these characteristics or incidents are wanting, the considerations which I have mentioned,

or to which I have alluded, leading to an opposite conclusion, require us to determine that they are included as fixtures, or necessary incidents in a conveyance of the real estate."[1]

On the other hand, it has been held in several well considered cases, that such rolling stock is in all respects personal property and not a fixture, and hence does not pass by a mortgage of the track or roadway, is liable to sale on execution, and for the collection of taxes against the company as personalty.[2]

[1] The following authorities were cited by the learned judge in support of this opinion: 2 Kent Com., 342; Snedeker v. Warring, 12 N. Y., 170 (1854); Bishop v. Bishop, 11 N. Y., 123 (1854); Olympic Theater, 2 Browne (Penn.), 285 (1813); Farrar v. Stackpole, 6 Me., 154 (1829); Lushington v. Sewell, 1 Sim., 435, 480 (1827); Rex v. St. Nicholas Gloucester, 1 Term, 723, note; s. c., Cald., 262 (1783); 3 Dane's Abr., 157.

[2] Stevens v. Buffalo, &c., R. R. Co., 31 Barb., 590 (1858); Beardsley v. Ontario Bank, 31 Barb., 619 (1859); Randall v. Elwell, 52 N. Y., 521 (1873); s. c., 11 Am. Rep., 747; Chicago & N. W. Railway Co. v. Ft. Howard, 21 Wisc., 44 (1866); Hoyle v. Plattsburgh, &c., R. R. Co., 54 N. Y., 314 (1873); s. c., 51 Barb., 45; 47 Barb., 104; see, also, Sangamon, &c., R. R. Co. v. Morgan, 14 Ill., 163 (1852). [Neilson v. Iowa Eastern R. Co., 51 Iowa, 184, 715 (1879); Boston, C. & M. R. R. v. Gilmore, 37 N. H., 410, 422 (1858); Williamson v. New Jersey S. R. R. Co., 29 N. J. Eq., 311, 331 (1878), reversing 28 N. J. Eq., 277 (1877); Speiden v. Parker, 46 N. J. Eq., 292, 293 (1886); Coe v. Columbus, P. & I. R. R. Co., 10 Ohio St., 372, 378 (1859); Salt Lake County v. Board of Equalization, 18 Utah, 172, 176 (1898); see, also, Hall v. Carney, 140 Mass., 131, 132 (1885); State Treas. v. Somerville & E. R. R. Co., 28 N. J. Law, 21 (1859); Hardesty v. Pyle, 15 Fed., 778, 779 (U. S. C. C., Pa., 1883); Wall v. Norfolk & W. R. R. Co., 52 W. Va., 485, 489 (1903). Seevers, J., in delivering the opinion of the court in Neilson v. Iowa Eastern R. Co., 51 Iowa, 184, 190 (1879), says: "Why the labored efforts of counsel, sustained by the elaborate opinions of the highest court in the country, demonstrating that mortgages executed by such corporations were liens on after acquired rolling stock, if the same was appurtenant to the realty? About an afterward erected station house there never was any doubt, because it is permanently annexed to the real estate, such being the intention. Not so, however, as to rolling-stock; hence the strain to prove it was covered by mortgages previously executed." In the same case it is said that the fact that mortgages upon railroads especially mention rolling-stock, indicates an intention not to make it a part of the realty. In many states, rolling-stock is made personal property by the constitution or by statute. See Columbia Trust Co. v. Kentucky R'y Co., 22 U. S. App., 54, 68 (U. S. C. C. A., Ky., 1894); Radebaugh v. Tacoma & P. R. R. Co., 8 Wash., 570 (1894); Illinois Bank v. Seattle R'y Co., 82 Fed., 936, 941 (U. S. C. C. A., Wash., 1897).] But parties taking a chattel mortgage upon such rolling-stock, may by their

The point was directly ruled in Stevens v. Buffalo, &c., R. R. Co., where the question was fully and ably considered, Greene, J., delivering the opinion of the court: "The engines, cars, etc., composing the rolling stock, it is well known are manu-*factured for sale to the different roads in the process of [*37] construction and operation throughout the country. They are as well adapted for use on one road as another of the same width or gauge as the road for which they were built or on which they are in use; and partly worn stock of this kind is frequently sold from roads on which it has been used, for the purpose of replacing it by new and improved machinery. It has always heretofore been treated as personal property, liable to seizure and sale on execution, and has often, by means of that process, been appropriated to the payment of the debts of the company." * * * "As was remarked by Judge Denio, in the case of Bishop v. Bishop, 1 Kern. 126, 'we are allowed to know judicially what every person out of the court knows,' that the engine, cars and other rolling stock on railroads are in their nature no more peculiarly adapted, nor in point of fact confined to any particular establishment or road, than farming implements or mechanical tools are to particular farms or workshops. True, there is a difference in the width of roads, requiring a corresponding difference in the width of the cars, as there is a difference in the surface and soil of farming lands, requiring a corresponding adaptation to them of implements and machinery used in agricultural operations. It is a well known matter of fact, moreover, that the rolling stock of railroads is often run and used habitually on other roads, hundreds of miles distant from the road to which such stock belongs, and into different States from that in which the road is located. It not only may be there, but it is in fact used 'generally' upon railroads without regard to the particular road to which it belongs. This practice is so common, when roads of the some width connect, as to authorize me to refer to it as a fact of general notoriety. That this species of property is a subject

conduct, estop themselves from claiming that a prior real estate mortgage does not cover such subsequently acquired rolling-stock as real estate. Benjamin v. Elmira, &c., R. R. Co., 54 N. Y., 675 (1873). See *post*, Taxation; Execution; also Const. Ill. (1870), Art. XI., § 10.

of frequent and extensive commerce or barter, I need hardly say. In this respect I confess I can see no difference between it and the other kinds of property referred to by the learned Justice,[1] none certainly that seems to justify the attempted distinction. As I have remarked in another place, this prop- [*38] *erty is constantly being manufactured to supply the constantly existing and increasing demand. It is sold as an article of commerce by the manufacturer, to railroad companies for their use, and not unfrequently made a subject of bargain and sale between different companies." * * *

"Some cars, it is true, are essential to the operation of a railroad. But the particular cars are no more necessary for that purpose than others of the same construction, which might be obtained to supply their places. The same means that put these cars on the road would procure others to take their places if they should be removed. To sell the rolling stock of a railroad would no more be a destruction of the road, in legal contemplation, than the sale of a farmer's teams, stock and farming utensils would be a destruction of his farm. In either case there may be a necessity of keeping the personal property, arising out of the pecuniary inability of the owner to replace it, and thus make the use of the other property, to which the personalty was essential, profitable. But the law regards no such necessity as this for any purpose; certainly not for the purpose of enabling a debtor to retain his property for his own emolument, and set his creditors, or any class of them, at defiance." * * * "The argument in favor of the position that engines and railroad cars are fixtures, applies with equal force to fuel, and indeed to everything else necessary to the effective operation of a railroad. Engines and cars without fuel would be as useless as the road bed and superstructure would be without engines and cars, and if, for the reasons now urged, the latter are to be regarded as fixtures, why not the former? Many reasons given why cars are fixtures, are more applicable to fuel than to cars, for that is always kept and consumed on the road, while [*39] the cars are frequently used elsewhere."[2] The want *of

[1] In Farmers' Loan & Trust Co. v. Hendrickson, cited *ante*.

[2] Fuel, oil and the like, which are designed for consumption in the use, and which may be sold and carried away, and used as well for other purposes

the element of localization in use, for want of which rolling stock cannot be subjected to the laws regulating taxation and liens on real estate, was, in Hoyle v. Plattsburgh R. R. Co.,[2] regarded as a controlling and conclusive reason why the character of realty should not be given to rolling stock of a railroad. The foregoing reasoning seems entirely satisfactory; and the better opinion, and the one supported by the weight of authority, is believed to be that the rolling stock of a railroad is simply personalty and not a fixture.[3]

IV. Intention.

With respect to the intention of the party as to annexing an article to the freehold, it is settled that mere intention to annex, unaccompanied with any act toward carrying that intention into effect, is insufficient to convert an article from personalty into realty;[4] and conversely a mere unexpressed *men- [*40]

as in the operation of the road, and when taken away have no distinguishing marks to show that they were designed for railroad uses, are personal property simply, and not fixtures. Palmer v. Forbes, 23 Ill., 301, 312 (1860); Hunt v. Bullock, Id., 320 (1860); Farmers' Loan & Trust Co. v. St. Jo., etc., R'w'y. Co., 3 Dill. C. C., 412 (1875). [Coal. Chicago & N. W. R'y Co. v. Ellson, 113 Mich., 30 (1897); cord-wood. Wyatt v. Levis & K. R. R. Co., 6 Que. L. R., 213, 223 (1880); lubricating oil. Standard Oil Co. v. Lane, 75 Wis., 636 (1890).] So as to office furniture, etc. Hunt v. Bullock (*supra*). [Wyatt v. Levis & K. R. R. Co., 6 Que. L. R., 213, 223 (1880).] So as to an iron safe and an iron planing machine. Titus v. Mabee, 25 Ill., 257 (1861).

[2] 54 N. Y., 314, 325 (1873).

[3] See the cases cited *ante* in note.

[4] Thus the simple intention on the part of the vendor, before selling his farm, to erect certain posts into a fence, and hewed timber into a granary, without having done anything toward those objects, more than to haul said posts and timber on to the farm before the sale of the farm, is not sufficient to convert them into fixtures. Cook v. Whiting, 16 Ill., 480 (1855). [Hinkle v. Hinkle, 69 Ind., 134 (1879). Lumber deposited upon a homestead lot for repairing the homestead, is not exempt from attachment. Carkin v. Babbitt, 58 N. H., 579 (1879). As to fertilizers, see Joiner v. Adams, 114 Ga., 389 (1901).] See, however, Conklin v. Parsons, 1 Chand., 240 (1849); s. c., 2 Pinney, 264; Ripley v. Page, 12 Vt., 353 (1839). ["It seems to be well settled in this state that suitable materials deposited upon a farm for the purpose and with the intention of building necessary fences with them

thereon, pass by a conveyance of the land as a part of the realty." Hackett v. Amsden, 57 Vt., 432, 436 (1885).]

So, mill saws purchased for use in a saw mill, but never set in the mill nor used there, nor in any way attached to it, though purchased with the intention of using them there, are not fixtures. Burnside v. Twitchell, 43 N. H., 390 (1861). So, as to rolls cast for a rolling mill, paid for and delivered at the mill, but never turned or finished off or put into the mill. Johnson v. Mehaffey, 43 Penn. St., 308 (1862). *Ex parte* Astbury L. R., 4 Ch. App., 630 (1869). [So as to machinery, although work had been commenced with the intention of putting it in place. Miller v. Wilson, 71 Iowa, 610, 614 (1887). But in Patton v. Moore, 16 W. Va., 428, 439 (1880), an engine and boiler hauled to a mill yard with a *bona fide* intention by the mill owner to make them fixtures in the mill, and without which the mill would be useless, were *held* to be a part of the realty. Otherwise, persons involved in any degree would not have much encouragement to erect permanent improvements, and building schemes would be frustrated and irreparable loss inflicted by a levy upon the materials. In Spruhen v. Stout, 52 Wis., 517, 525 (1881), a mechanics' lien was given for a draft tube which had not been attached to the mill through no fault of the claimants, but had been designed and procured for that purpose.]

So, a stone quarried and brought from a distance into a door yard, for the purpose of being fitted and used at some future time for a door step, but not actually so fitted and placed, is a mere chattel. Woodman v. Pease, 17 N. H., 282 (1845). [Taking stones from the surface of a farm, and piling them up with the intention of using them for building, do not make them real estate. McCarthy v. McCarthy, 20 Can. Law T., Occ. N., 211, 212 (Co. Ct., Ont., 1900).]

See, also, Manchester Mills v. Rundlett, 23 N. H., 271 (1851); Peck v. Batchelder, 40 Vt., 233 (1867); Hedge's Case, 1 Leach Cr. L., 240 (1779); Tripp v. Armitage, 4 M. & W., 687 (1839); s. c., 8 L. J. (N. S.), Exch., 107; Johnson v. Hunt, 11 Wend., 135 (1834). [Wolford v. Baxter, 33 Minn., 12, 19 (1884); Williamson v. New Jersey S. R. R. Co., 29 N. J. Eq., 311, 329 (1878); National Bank v. North, 160 Pa. St., 303 (1894); see, also, Roddy v. Brick, 42 N. J. Eq., 218, 224 (1886); McKeage v. Hanover Ins. Co., 81 N. Y., 38, 41 (1880).] See, however, the next note; Johnston v. Dobie, Mor. Dict., 5443 (1783), cited *post*, in chap. 9.

Art. 468, Civil Code of La., provides that "materials arising from the demolition of a building, those which are collected for the purpose of raising a new building, are movables until they have been made use of in raising a new building. But if the materials have been separated from the house or other edifice only for the purpose of having it repaired or added to, and with the intention of replacing them, they preserve the nature of immovables, and are considered as such." Under this article, brick and lumber for the first time collected together and lying around convenient to be used as the work progressed, intended to be used in the construction of an edifice, but never having been so used, are movables, and subject to execution as such. Beard v. Duralde, 23 La. Ann., 284 (1871).

tal intention by the owner of real estate, to sever and remove fixtures therefrom, irrespective of acts in execution thereof, is insufficient to convert such fixtures into chattels.[1]

Testimony on the part of the party making the annexation of an intention on his part at the time thereof, that such an-

[Sleepers, fastenings and materials in hand for the repairing of a railroad and engines from time to time as required, are not immovable by destination, but are subject to seizure. Wyatt v. Levis & K. R. R. Co., 6 Que. L. R., 213 (1880).]

[1] Bratton v. Clawson, 2 Strobh. Law, 478 (1848); 3 Id., 127; Tate v. Blackburne, 48 Miss., 1 (1873), where such fixtures were held to pass by a conveyance of the land. See also Rogers v. Brokaw, 25 N. J. Eq., 496 (1875). [Towson v. Smith, 13 D. C. App., 48, 57 (1898); Salter v. Sample, 71 Ill., 430, 433 (1874); Kloess v. Katt, 40 Ill. App., 99, 100 (1891); Crum v. Hill, 40 Iowa, 506, 507 (1875); Maginnis v. Union Oil Co., 47 La. Ann., 1489, 1495 (1895); People v. Jones, 120 Mich., 283, 284 (1899); Miles v. McNaughton, 111 Mich., 350, 354 (1896); State Sav. Bank v. Kercheval, 65 Mo., 682, 686 (1877); Tyler v. White, 68 Mo. App., 607, 611 (1897); Murray v. Bender, 125 Fed., 705 (U. S. C. C. A., Mont., 1903); Leonard v. Clough, 133 N. Y., 292, 296 (1892), overruling 14 N. Y. Supp., 339 (1891); Minhinnick v. Jolly, 29 Ont., 238, 246 (1898); aff'd in 26 Ont. App., 42 (1899); see, also, Gunderson v. Swarthout, 104 Wis., 186, 192 (1899). Where a land owner built a railroad under an agreement with a licensee of the land that, upon payment of the price, it might be removed by the licensee, it is not such a delivery of the railroad as to make it subject to execution as personal property in the possession of the licensee. Webster Lumber Co. v. Keystone Lumber Co., 51 W. Va., 545 (1902). Stone, which has been gathered and placed in rows to enable land to be cultivated, is not a conversion of it into chattels. Ellis v. Wren, 84 Ky., 254 (1886).] But a stone split out and slightly removed from its original connection or position in the ledge, and propped up for the purpose and with the intention on the part of the owner of the farm of removing it from the farm, and using in in preparing a tomb, will not pass by a conveyance of the land. It would be "governed by the same principles that are applicable to timber, fence rails, and the like, that have been removed from the freehold in fact, but remain upon the premises for the purpose of being used there in the construction of fences, etc.; and if on the land at the time the premises are conveyed they will pass by the deed; but if they are not for the purpose of being used upon the premises, but to be removed elsewhere, then they do not pass by the deed." * * * * "As there was nothing about the stone or the position in which it was placed, to indicate the use to which it was to be put, whether for fencing or underpinning, or the like, upon the premises, or for use elsewhere, it was a proper subject of explanation between the plaintiff and Wallace at the time the deed was executed, and such explanation might well be by parol; it was not an exception of that

[*41] *nexation should be only temporary, and to remove the article in question at some future time, such intention being secret, inchoate, and not expressed by words or acts indicative thereof, is inadmissible as against a grantee or mortgagee of the land, to rebut the evidence afforded by acts and circumstances of an intention on his part to make such annexation permanent;[1] and conversely, testimony as to the secret, inchoate, unexecuted intention of the owner of the freehold unaccompanying the act of severance to substitute different fixtures for fixtures temporarily severed for convenience during the process of repairs, is inadmissible to vary their nature or deprive them of the character of fixtures.[2] In order to give effect to the intention

which would otherwise pass by the deed, but the giving to Wallace a knowledge of facts showing that it would not pass, and thus avoiding all misunderstanding or controversy about it in the future. The fact that such information was accompanied by an exception in form, does not vary the principle.'' Noble v. Sylvester, 42 Vt., 146 (1869).

[1] Treadway v. Sharon, 7 Nev., 37 (1871); Tate v. Blackburne, 48 Miss., 1, 6 (1873); ''Such an intention must be made out by acts, words and circumstances. * * * An unexpressed mental intention is a myth; it is intangible; it is subject to no law, and cannot be tried. To give it efficacy would invite to frauds, and perjury, which no court or criminal code could reach, as the evil minded could defy the ingenuity of legislators and of grand juries.'' See, also, Snedeker v. Warring, 12 N. Y., 178 (1854). [West Coast Lumber Co. v. Apfield, 86 Cal., 335 (1890); Matzon v. Griffin, 78 Ill., 477, 480 (1875); Davis v. Mugan, 56 Mo. App., 311, 318 (1893); New York Life Ins. Co. v. Allison, 107 Fed., 179, 186 (U. S. C. C. A., N. Y., 1901); Cosgrove v. Troescher, 62 App. Div., 123, 126 (N. Y., 1901); Phoenix Mills v. Miller, 4 N. Y. St. R., 787, 791 (1886); Burkhardt v. Hopple, 6 Ohio Dec., 127, 129 (1897); Copp v. Swift, 26 S. W., 438 (Tex. Civ. App., 1894); Stack v. Eaton, 4 Ont. Law, 335, 338 (1902); see, also, Fisk v. Peoples' Bank, 14 Colo. App., 21, 27 (1899); Bradley v. Ritchie, 12 Pa. Dist., 658, 660 (1903).] See, however, Rogers v. Brokaw, 25 N. J. Eq., 496 (1875).

[2] Wadleigh v. Janvrin, 41 N. H., 503 (1860). The question as to the intention with which an annexation is made, is one of fact for the jury. Seeger v. Pettit, 77 Penn. St., 437, 441 (1875); and evidence that a firm, the tenants, treated the fixtures in question as their own property, and included them among their assets, was held competent on such question of intention in Seeger v. Pettit (*supra*). [See Wentworth v. Woods Co., 163 Mass., 28, 33 (1895); Merchants' Nat. Bank v. Stanton, 59 Minn 532, 536 (1894); and, *post*, p. *89.]

[The question as to intention is for the jury. Tillman v. DeLacy, 80 Ala., 103, 107 (1885); Traders Bank v. First Nat. Bank, 6 Kan. App., 400

(1897); Studley v. Ann Arbor Bank, 112 Mich., 181, 185 (1897); Stevens v. Rose, 69 Mich., 259, 267 (1888); Brownell v. Fuller, 60 Neb., 558, 546 (1900); Phoenix Mills v. Miller, 4 N. Y. St. R., 787, 791 (1886); Alberson v. Elk Creek Min. Co., 39 Ore., 552, 559 (1901); Harrisburg Light Co. v. Goodman, 129 Pa. St., 206 (1889); Silliman v. Whitmer, 11 Pa. Super., 243, 257 (1899), aff'd 196 Pa. St., 363, 365 (1900); Copp v. Swift, 26 S. W., 438 (Tex. Civ. App., 1894); Fowler v. Fowler, 15 N. Brunsw., 488, 491 (1875); see, also, Pfluger v. Carmichael, 54 App. Div., 153, 154 (N. Y., 1900); and, *ante*, p. *24, and, *post*, p. *94. But where there is a contract, this would determine the intention of the parties, which it is the duty of the court to construe. Gulf, C. & S. R'y Co. v. Dunman, 35 S. W., 947, 948 (Tex. Civ. App., 1896).]

[Where all parties have passed title to an engine and boiler by bill of sale and chattel mortgage, it shows intent to regard them as personal property. Lansing Works v. Wilbur, 111 Mich., 413, 420; Alberson v. Elk Creek Min. Co., 39 Ore., 552, 559 (1901).]

[Where the grantor of a house claims pay for articles therein over and above the price of the house, and finally gives them to the grantee as an inducement to buy the land, it is clear evidence that the grantor intended that the articles should not be a part of the realty; and it is not evidence to the contrary that, in a prior mortgage of the house, it was agreed that the articles should be covered by the mortgage. Lea v. Shakespeare, 10 Montg. Co. (Pa.), 171 (1893).]

[Statements by the purchaser of a sawmill that he wanted one that he could move, as he intended to move it several times, and his subsequent statement that he intended to move it, is admissible. Benedict v. Marsh, 127 Pa. St., 309 (1889).]

[Where the petition alleges that a building and machinery, after purchase thereof, were removed by the plaintiff, the land owner, from one county to another, it must be inferred they are movable structures, capable of being transferred without injury to themselves or to the land. Harkey v. Cain, 69 Tex., 146, 150 (1887).]

[An agreement, cotemporaneous with a mortgage, that the mortgage was to cover certain machinery to be placed upon the land, may be proven to show with what intent the machinery was placed upon the land. Seed-house v. Broward, 34 Fla., 509, 524 (1894).]

[Where a mortgage of a building is written upon a blank intended for a real estate mortgage, and the grantor styles himself an "unmarried" man, the intention to treat the building as real estate is clear. Wilds v. Ward, 138 Ind., 373, 379 (1894).]

[Where copartners purchase land for a brick yard, and purchase machinery necessary for the manufacture of brick, and until they unite the two they were not prepared to proceed, it is evidence of an intention to make the machinery a permanent annexation. Fisk v. Peoples' Bank, 14 Colo. App., 21, 26 (1899).]

[Where, by agreement between the mortgagors and the mortgagee of a mill, the former were to place a certain amount of machinery in the

mill, which was done, and one of the mortgagors sold his interest in the mill and machinery to the other, subject to the mortgage, an intention is shown to make such machinery a part of the realty. Muehling v. Muehling, 181 Pa. St., 483, 491 (1897).]

[Where money is loaned for the purpose of erecting a tack factory and placing machinery therein, and such machinery has passed without question under various conveyances and mortgages of the realty, it shows an intent to regard the machinery as a fixture although capable of being removed without injury to the building. Homestead Land Co. v. Becker, 96 Wis., 206, 210 (1897).]

[If the party owning land upon which a building is erected, moves the building to other land owned by him, it is some evidence of unity of title to the land and building, showing an intent, when the building was first erected, to make it a fixture. Byrnes v. Palmer, 113 Mich., 17, 19 (1897).]

[Where the owner of land, who thinks that there is a cloud upon his title, erects a building which he intends shall be permanent if his title is good, it shows intent to make the structure a part of the realty. Miles v. McNaughton, 111 Mich., 350, 354 (1896).]

[Intent is shown by a verbal promise of a purchaser of land under contract, as an inducement thereto, that he would build a shop and put machinery therein. Taylor v. Collins, 51 Wis., 123, 129 (1881).]

[The fact that fixtures would not fit nor be adapted to any other building or store room would be pertinent, but not conclusive of an intention to make them a part of the realty. McLean v. Palmer, 2 Luz. Leg. Reg. R., 349, 354 (1882).]

[Insuring fixtures separately from building is not in itself sufficient to indicate an intention to consider them chattels. McCausland v. McCallum, 3 Ont., 305, 309 (1883).]

[The fact that it is expected in time to supplant the machinery in a power-house of an electric railway, with improved machinery, and that provision has been made to remove it without injury, does not change its character as real estate while annexed. Detroit United R'y v. Board of Commissioners, 98 N. W., 997, 999 (Mich., 1904).]

[The fact that the land and machinery were acquired by a mortgagor at the same time, and without any other instrument than the deed to the land, and their use for many years in the same place, does not change the legal character of such machines. Keeler v. Keeler. 31 N. J. Eq., 181, 193 (1879).]

[Where fixtures are so affixed to the freehold that they can not be removed without destroying the character of the premises, the fact that the mortgagor may, on other occasions, have given chattel mortgages thereon, does not show an intention that they are not to pass as part of the realty. Carson v. Simpson, 25 Ont., 385 (1894).]

[That a mortgagor has filed a declaration of homestead would not prove the intention with which articles were affixed; nor would the fact that the house would be of less value if such articles were removed from it. Philadelphia Mort. Co. v. Miller, 20 Wash., 607 (1889).]

of a party not to make an erection a permanent accession to the realty, the person making the improvement must have the right to determine whether or not the erection shall become a part of the realty; and if, as between himself and the owner of the soil, he has no right to erect the same as property separate and distinct from the freehold, an intention to do so, no matter how clearly manifested, is of no avail.[3]

[3] Ogden v. Stock, 34 Ill., 522 (1864). In this case the purchaser of a city lot under a contract of purchase, providing that upon default in any of the payments the vendor might terminate the agreement and treat the vendee, his representatives or assigns as tenants at will at a specified rent, while owing the greater portion of the purchase money, in default for payments matured, and paying no rent for his occupation of the premises, conjointly with defendant under an agreement that each should own half thereof, erected thereon a dwelling house placed upon blocks resting on boards lying on the ground, and afterwards sold his share to defendant, who removed it from the lot; and it was *held*, that while in the enjoyment of the property under such circumstances, he could not honestly assert that he did not intend to perform his contract, and that he intended the erection on the lot as property separate from the freehold, and therefore neither he nor his vendee could rightfully remove it from the premises.

So, where one enters upon the land of another as tenant of one claiming to have a tax title to the land, and under a claim of right, adverse to the true owner, erects a building thereon, to be occupied by him as a dwelling as a part of his adverse enjoyment of the premises, he has no right to remove such building as against the true owner of the land, although the building is constructed of wood, and set upon small posts set up and braced upon planks laid upon the surface of the ground, and though the foundation is not let into the soil. The pretended owner of the tax title not having by reason of his intention at some future day to remove it, the right as against the true owner to remove such a building having in all other respects the character of a fixture, his tenant cannot remove it by reason of such intention; such previous intention to remove, is, in the case of a trespasser, inadmissible for the purpose of changing the character of the property from real to personal. Neither does it make a difference, that, as against his landlord, by the custom of the city of Milwaukee, such buildings erected by tenants on leased lots are considered personal property, and in the absence of restrictions in the lease, are removable on its termination. Huebschmann v. McHenry, 29 Wis., 655 (1872). See, also, Smith v. Moore, 26 Ill., 392 (1861); and a further consideration of the subject in relation to erections *alieno solo*, vendor and vendee, mortgagor and mortgagee. [Hereford v. Pusch, 68 Pac., 547 (Ariz., 1902); Wright v. DuBignon, 114 Ga., 765, 771 (1901); Henderson v. Ownby, 56 Tex., 647, 649 (1882); Gulf, C. & S. R'y Co. v. Dunman, 35 S. W., 947, 948

[*42] *Inasmuch as it requires a positive act on the part of the person making the annexation to change the nature and legal qualities of a chattel into those of a fixture, it is quite generally considered that the intention to make the article a permanent accession to the realty, must affirmatively and plainly appear; and if it be a matter left in doubt or uncertainty, the legal qualities of the article are not changed, and the article must be deemed a chattel.[1] But the fact that the owner of the fee had no special intent as to making the articles annexed a part of the freehold, there being no intention as to removing them at any future time, is immaterial, where they are actually and firmly annexed to the freehold in the usual manner, and adapted [*43] to use in that position, though capable of removal *without injury to the building or themselves. The facts in such a case furnish evidence of intent to make a part of the freehold.[2]

(Tex. Civ. App., 1896); Allan v. Rowe, 1 N. Brunsw. (Trueman), 41, 48 (1894); see, also, Hobson v. Gorringe [1897], 1 Ch., 182, 192.]

[Conversely, an intention to make an article a part of the realty is of no avail against the owner of the article who has not given his consent thereto. Central Branch R. R. Co. v. Fritz, 20 Kan., 430, 435 (1878); Case Mfg. Co. v. Garven, 45 Ohio St., 289, 301 (1887).]

[1] Teaff v. Hewitt, 1 Ohio St., 511, 533 (1853); Fortman v. Goepper, 14 Ohio St., 558, 567 (1863); Hunt v. Mullanphy, 1 Mo., 508 (1825); Weathersby v. Sleeper, 42 Miss., 732 (1869); Hill v. Wentworth, 28 Vt., 428, 437 (1856); Cole v. Roach, 37 Tex., 413, 417 (1872); Capen v. Peckham, 35 Conn., 88, 95 (1868). As to the amount of evidence to establish this point, and especially as regards the subject of annexation, there is, as has been seen, a great diversity of opinion. See *ante*, Annexation. [Langston v. State, 96 Ala., 44, 47 (1891); Tillman v. DeLacy, 80 Ala., 103, 107 (1885); Morey v. Hoyt, 62 Conn., 542, 553 (1893); Johnson v. Mosher, 82 Iowa, 29, 32 (1891); Clore v. Lambert, 78 Ky., 224, 232 (1879); Hayford v. Wentworth, 97 Me., 347, 350 (1903); Allen v. Woodard, 125 Mass., 400, 402 (1878); Schneider v. Schneider, 6 Ohio Dec., 106, 107 (1897); Dowall v. Miln (1874), 1 Sess. Cas., 4th Ser., 1180; Keefer v. Merrill, 6 Up. Can. App., 121 (1881); Canada Sav. Co. v. Merchants' Bank, 3 Man., 285 (1886); see, also, Hacker v. Munroe, 176 Ill., 384, 395 (1898); Hillebrand v. Nelson, 95 N. W., 1068, 1070 (Neb., 1901); Globe Marble Co. v. Quinn, 76 N. Y., 23 (1879).]

[2] Voorhees v. McGinnis, 48 N. Y., 278 (1872). [Towson v. Smith, 13 App., D. C., 48, 58 (1898); Seedhouse v. Broward, 34 Fla., 509, 524 (1894); Calumet Iron Co. v. Lathrop, 36 Ill. App., 249, 256 (1889); West v. Farmers' Mut. Ins. Co., 117 Iowa, 147, 151 (1902); Maginnis v. Union Oil Co., 47 La. Ann., 1489, 1496 (1895); Feder v. VanWinkle, 53 N. J. Eq.,

And perhaps it may also be stated as a rule supported by the weight of authority, that where an article is actually annexed to the land, it will be presumed to have been so attached with a view to the permanent improvement or beneficial enjoyment of the freehold, and will be deemed a part of the realty, unless the circumstances are such as to show that it was intended all along to continue a chattel.[3]

370, 376 (1895); Canning v. Owen, 22 R. I., 624, 629 (1901); Jones v. Bull, 85 Tex., 136, 140 (1892); see, also, White v. Cincinnati, R. & M. R. R., 71 N. E., 276, 278 (Ind. App., 1904); Atlantic Trust Co. v. Atlantic City Laundry Co., 64 N. J. Eq., 140, 145 (1902); Lee v. Hubschmidt Bldg. Co., 55 N. J. Eq., 623, 626 (1897); Knickerbocker Trust Co. v. Penn. Cordage Co., 58 Atl., 409, 410 (N. J., 1904).]

[Courts will take judicial notice that certain machinery is usually attached so as to become part of the realty. Wickes v. Hill, 115 Mich., 333, 339 (1897).]

[3] See Potter v. Cromwell, 40 N. Y., 287 (1869); Holland v. Hodgson, L. R. 7 C. P., 328, 335 (1872) *ante*, p. 30; Lancaster v. Eve, 5 C. B. (N. S.), 717 (1859); Wilde v. Waters, 16 C. B., 637 (1855). See, also, Tifft v. Horton, 53 N. Y., 377, 380 (1873); Brearley v. Cox, 24 N. J. Law, 287, 290 (1854); Ogden v. Stock, 34 Ill., 522, 527 (1864); Baldwin v. Walker, 21 Conn., 168 (1851); and the cases cited *post*, in Ch. 3. See, however, *ante*, Annexation, and cases cited. [See, also, *post*, p. *294. Johnston v. Phila. Mort. Co., 129 Ala., 515, 522 (1900); Sword v. Low, 122 Ill., 487, 500 (1887); Docking v. Frazell, 34 Kan., 29, 34 (1885); Hopewell Mills v. Taunton Bank, 150 Mass., 519, 521 (1890); Schuchardt v. Mayor of New York, 53 N. Y., 203, 208 (1873); Morotock Ins. Co. v. Rodefer, 92 Va., 747, 753 (1896); Lyon v. London City Bank [1903], 2 K. B., 135, 139; Stack v. Eaton, 4 Ont. Law, 335, 338 (1902); Allan v. Rowe, 1 N. Brunsw. Eq. (Trueman), 41, 51 (1894); see, also, Cook v. Condon, 6 Kan. App., 574 (1897); Clark v. McKnight, 25 Tex. Civ. App., 60, 63 (1901); Reynolds v. Ashby [1903], 1 K. B., 87.]

[A rule seems to obtain in Ohio and some other states, to regard the motive power in a mill, with the means of communicating such power, although the annexation may be slight, as a part of the realty, and to hold that the machinery propelled thereby is personalty. "Motive power is generally more closely annexed to the freehold and of a more permanent nature, as the power furnished by it may be adapted to the propulsion of the machinery of a variety of mills without any substantial change in the motive power itself or in the building other than by substituting one kind of machinery for another; whilst the machinery that is propelled has more of the general character of personalty, is not as a rule so closely annexed to the freehold, and may be removed, and frequently is, from one mill to another, as any other article of personalty; and is more properly 'accessory to the business' carried on upon the realty than to the realty

In some cases the law presumes, from the relation of the parties, that annexations to the realty are made with the design of their being permanent.[4] The presumption as to the intent with which annexations are made to the realty, vary, however, according to the relations existing between the parties, as being landlord and tenant, vendor and vendee, etc., and will be considered in the course of the work when those relations respectively come under consideration. The subjects of the nature of the thing annexed, its mode of annexation, etc., will also be hereinafter considered in the course of the work.

V. Severance.

With regard to what constitutes a severance sufficient to convert an article from a fixture to a mere chattel, it is to be observed that the mere act of physical severance is not always sufficient to accomplish that end. Thus, a mere accidental severance, or a severance for a temporary purpose, as for the sake of repairs, etc., does not deprive a fixture of its character as a [*44] *part of the realty.[5] In order to effect that purpose, the

itself. * * * * * * It may, however, be admitted that the distinction between the motive power of a factory and the machines driven by it is somewhat arbitrary; still it is one based upon a physical difference, easily perceived, and is no more illogical than many distinctions to be found in other branches of the law.'' Case Mfg. Co. v. Garven, 45 Ohio St., 289 (1887), modifying Garven v. Hogue, 14 Wkly. Cin. Law Bul., 175 (C. C., 1885); Commissioners of Anne Arundel County v. Baltimore Sugar Co., 58 Atl., 211, 212 (Md., 1904); see, also, Steed v. Knowles, 79 Ala., 446, 448 (1885); Hart v. Sheldon, 41 Supr. Ct. (34 Hun.), 38, 44 (N. Y., 1884). In Ottumwa Mill Co. v. Hawley, 44 Iowa, 57, 64 (1876), the rule making a distinction between the motive power and the machinery propelled thereby, is not approved.]

[4] See Smith v. Moore, 26 Ill., 394 (1861), and *ante*, p. *41, note (3). [Davis v. Eastham, 4 Ky. Law R., 850, 852 (1883); Albert v. Uhrich, 180 Pa. St., 283 (1897); Furrh v. Winston, 66 Tex., 521, 526 (1886).]

[5] See Wystow's case, 14 Hen. 8, 25 b (1522), cited *ante*, p. *33; Wadleigh v. Janvrin, 41 N. H., 503 (1860); McLaughlin v. Johnson, 46 Ill., 163 (1867); Goodrich v. Jones, 2 Hill, 142 (1841); Rogers v. Gilinger, 30 Penn. St., 185 (1858), cited *post* Ch. 9; Congregational Society of Dubuque v. Fleming, 11 Iowa, 533 (1861). [Steed v. Knowles, 79 Ala., 446, 448 (1885); Guernsey v. Phinizy, 113 Ga., 898, 900 (1901); Wilmarth v. Bancroft, 92 Mass., 348, 349 (1865); Hannibal & St. Jo. R. R. Co. v. Crawford, 68 Mo., 80, 82 (1878); Leidy v. Proctor, 97 Pa. St., 486, 488 (1881);

act of severance must, as it seems, not only be done by one having the right to do it,[6] but must also be done with the intention of

Patton v. Moore, 16 W. Va., 428, 441 (1880); Lewis v. Rosler, 16 W. Va., 333, 334 (1880); Grant v. Wilson, 17 Up. Can. Q. B., 144, 147.]

See, also, Goddard v. Bolster, 6 Me., 427 (1830); Bainway v. Cobb, 99 Mass., 457 (1868); Heaton v. Findlay, 12 Penn. St., 304 (1849). [Grimshawe v. Burnham, 25 Up. Can. Q. B., 147 (1865); and, *post*, p. *304.]

See, however, Buckout v. Swift, 27 Cal., 433 (1865).

See the statutory regulations on the subject in Louisiana (C. C., Art. 468), considered in Beard v. Duralde, 23 La. Ann., 284 (1871); Key v. Woolfolk, 6 Rob., 424 (1844); Nimmo v. Allen, 2 La. Ann., 451 (1847).

[In Leidy v. Proctor, 97 Pa. St., 486, 488 (1881), it is said that fallen timber is not severed until the owner converts it into logs; but in *Re* Ainslie (1885), 30 Ch. D., 485, overruling (1884) 28 Ch. D., 89, 92, it is said that a tree severed from the soil by a storm is personalty. In regard to the question when the severance is complete, Lord Chan. Halsbury said: "If a tree is so fixed to the ground that it would be necessary to apply some new force in order to remove it from the ground, then it would be attached to the soil. If the roots were broken in the soil so that the tree and its roots were in truth and in fact severed from each other, then, although some of the broken parts of the tree might still remain covered with earth, I should say that it would be in truth and in fact severed, although to the casual observer it would seem to have some of the roots in the ground. * * * * * If the connection between the soil and tree was some minute filament * * * * * then such tree was not affixed to the soil at all;" and, according to Lindley, L. J. (1885), 30 Ch. D., 485, 488, the burden of showing that trees are severed by a storm is upon those so claiming.]

[Where taxes were a lien upon a flouring mill, which afterwards burned down, the lien did not attach to fixtures so severed. State v. Goodnow, 80 Mo., 271, 275 (1883).]

[It seems that trade-fixtures severed by fire are liable to be taken in execution though they would not be while annexed. Donkin v. Crombie, 11 Up. Can., C. P., 601, 605.]

[Where a rail fence, on account of its age and decay, is no longer fit for a fence, and ceases to be used as such, it ceases to be a part of the realty. Fullington v. Goodwin, 57 Vt., 641 (1885). See, further, as to severance by decay, *post*, p. *223.]

[6] See Ogden v. Stock, 34 Ill., 522 (1864); Huebschmann v. McHenry, 29 Wis., 655 (1872), cited *ante*. These cases may not come up to the point stated in the text, but serve to throw some light upon the question.

See, also, Gray v. Holdship, 17 S. & R., 413 (1828); Heaton v. Findlay, 12 Penn. St., 307 (1849); Hemenway v. Cutler, 51 Me., 407 (1863); Jewett v. Whitney, 43 Id., 242 (1857); Grover v. Howard, 31 Id., 546 (1850). [Green v. Chicago, R. I. & P. R. R. Co., 8 Kan. App., 611, 614 (1899); Wylie v. Grundysen, 51 Minn., 360, 362 (1892); Freeman v. Lynch, 8 Neb.,

converting the article into the state of a chattel,[7] though, if the severance has been made by a stranger, or one not having the right so to do, the owner of the freehold may of course elect to consider the things severed as personalty, as by bringing replevin, trespass *de bonis asportatis,* or trover for their conversion.[8]

192 (1879); Stagg v. Piland, 31 Tex. Civ. App., 245, 247 (1903); and see Tucker v. Linger (1883), 8 App. Cas., 508, as to flints ploughed up by a tenant.]

[An orphans' court has no power to sever fixtures, even though it might be for the benefit of the estate. Walter Est., 10 Luz. Leg. Reg. R., 221 (1899).]

[7] See the cases cited in note (1) *supra;* also, Bainway v. Cobb, 99 Mass., 457 (1868). [Lewis v. Rosler, 16 W. Va., 333, 343 (1880); see, also, Bacon v. Lewis, 33 Can. Law J., 680, 687 (1897).]

[Where the parties to a contract of sale of land, pending a dispute as to whether an engine and mining machinery thereon constitute a part of the land, mutually agree to a conversion into money to prevent spoliation thereof, the right of the party who was entitled to them as fixtures is not affected. Moore v. Valentine, 77 N. C., 188, 192 (1877).]

[Where a purchaser of stones from the owner of the soil removes them from the walls and fields, and piles them upon another portion of the farm, they are severed from the soil, and become personal property as against a grantee of the farm. Fulton v. Norton, 64 Me., 410 (1875).]

[Where a creditor has seized land upon which are growing crops, and has, through the sheriff, gathered and stored the crops, the character of the property is not changed; and if the creditor under the same mortgage, makes a second seizure, the crops remain subject thereto. Townsend v. Payne, 42 La. Ann., 909, 914 (1890).]

Perhaps, however, where the severance is by the owner of the freehold, in the absence of evidence to the contrary, an intention to convert into the state of a chattel may be presumed, which may perhaps explain many cases where the simple act of severance by the owner of the land has been held to convert the thing severed into a chattel. See Bliss v. Misner, 4 N. Y. Supreme Court R., 633 (1874).

[8] See Rogers v. Gilinger, 30 Penn. St., 185 (1858); Riley v. Boston Water Power Co., 11 Cush., 11 (1853); Strickland v. Parker, 54 Me., 263 (1866); Laflin v. Griffiths, 35 Barb., 58 (1860); *post* Remedies. [McNally v. Connolly, 70 Cal., 3, 6 (1886); Webb v. Phillips, 54 U. S. App., 54, 59 (U. S. C. C. A., Ky., 1897); Westgate v. Wixon, 128 Mass., 304, 307 (1880); Nelson v. Graff, 12 Fed., 389 (U. S. C. C., Mich., 1882); Gasco v. Marshall, 7 Up. Can., Q. B., 193, 196; see, also, United States v. Loughrey, 34 U. S. App., 575, 580 (U. S. C. C., Wis., 1896); and, *post,* p. *47.]

[Where a trespasser has begun to move a stable, it is personal property so far as he is concerned, although the building, at the time of the service

As before observed, however, a mere intention on the part of the owner of the land to sever a fixture, without any corresponding action, is insufficient to convert it into personal property.[9] And therefore, where the defendant in two executions caused one of them to be levied on a fixture (a cotton gin), and *gave a bond for its delivery to the sheriff, the gin not be- [*45] ing moved from the rest of the machinery, this was held not to be such a severance as to prevent the gin from passing, on a sheriff's sale of the land on which it stood, to another person, there being no proof of notice to such person of such levy.[10] Neither can a creditor, by excepting as personal property a building on the premises from a levy on the land on which it is situated, when it is, in fact, a part of the realty, change the character of his debtor's estate, and convert a part of it into personalty.[11]

There may, however, be a severance in law without a severance in fact, as where the owner of the freehold grants away the trees, etc., or fixtures, without the land, or sells the land, reserving the trees, fixtures, etc., from the sale, in both of which cases the fixtures, though in fact remaining annexed to the soil, become, as between the parties, legally separated from the realty, and hence are personal property.[12] So, fixtures may,

of the replevin writ, is not wholly removed. The starting of the building from its place with intent to remove it from the land, is a severance. Luce v. Ames, 84 Maine, 133, 134 (1891).]

[9] See *ante*, p. *39.

[10] Bratton v. Clawson, 2 Strobh. Law, 478 (1848); s. c., 3 id., 127. See, also, Bank of Lansingburg v. Crary, 1 Barb., 542 (1847). [Budden and Knight, 3 Que. L. R., 273, 282 (1877); Batterman v. Albright, 122 N. Y., 484 (1890).]

[11] Hemenway v. Cutler, 51 Me., 407 (1863); Jewett v. Whitney, 43 id., 242 (1857); Grover v. Howard, 31 id., 546 (1850). [Cutting v. Pike, 21 N. H., 347, 352 (1850).]

[At a sale under a power in a deed of trust, the trustee has no right to sell the lots without the fixed permanent improvements placed thereon by the mortgagor, when such improvements would thereby be rendered worthless, and where the lots and improvements together are worth several times the value of the lots alone. Hill v. Shoemaker, 8 D. C., 305, 311 (1874).]

[12] See Bank of Lansingburg v. Crary, 1 Barb., 542 (1847); Davis v. Emery, 61 Me., 140 (1870); Hoit v. Stratton Mills, 54 N. H., 110 (1873); Sterling v. Baldwin, 42 Vt., 306, 310 (1869); Shaw v. Carboy, 13 Allen, 462 (1866). See, also, Nelson v. Nelson, 6 Gray, 385 (1856); *post* chap.

8, as to growing timber; chap. 9, as to influence of recording acts. [Rogers v. Cox, 96 Ind., 157, 160 (1884); Meinke v. Nelson, 56 Ill. App., 269, 271 (1894); Asher Lumber Co. v. Cornett, 22 Ky. Law R., 569, 570 (1900); Tilford v. Dotson, 21 Ky. Law R., 333, 335 (1899); Lockeshan v. Miller, 16 Ky. Law R., 55 (1894); Hunter v. Burchett, 5 Ky. Law R., 770 (Super., 1884); Maginnis v. Union Oil Co., 47 La. Ann., 1489, 1496 (1895); Merrill v. Wyman, 80 Me., 491 (1888); O'Brien v. Mueller, 96 Md., 134, 137 (1902); Sanborn v. Hoyt, 24 Me., 118 (1844); Manwaring v. Jenison, 61 Mich., 117, 139 (1886); Edwards Co. v. Rank, 57 Neb., 323, 326 (1899); Stackpole v. Eastern R. R., 62 N. H., 493, 494 (1883); Schuchardt v. Mayor of New York, 53 N. Y., 202, 208 (1873); Cowell v. Phoenix Ins. Co., 126 N. C., 684 (1900); Long v. White, 42 Ohio St., 59, 61 (1884); Willis v. Moore, 59 Tex., 628 (1883); Lombardi v. Spero, 14 Tex. Civ. App., 594, 597 (1896); Straw v. Straw, 70 Vt., 240, 242 (1897); Kimball v. Sattley, 55 Vt., 285, 291 (1883); Keefe v. Furlong, 96 Wis., 219, 221 (1897); Kirch v. Davies, 55 Wis., 287, 296 (1882); Smith v. Waggoner, 50 Wis., 155, 162 (1880); Corcoran v. Webster, 50 Wis., 125, 130 (1880); Rose v. Hope, 22 Up. Can. C. P., 482, 485; see, also, Rich v. Donovan, 81 Mo. App., 184 (1899); McGregor v. McNeil, 32 Up. Can. C. P., 538 (1882); Walton v. Jarvis, 14 Up. Can. Q. B., 640; and, *post*, p. *311.] See, however, Burk v. Hollis, 98 Mass., 55 (1867). [Eddy v. Hall, 5 Colo., 576, 581 (1881).]

[Where land was demised, and the buildings thereon were sold by the landlord to the tenant, the buildings became chattels; and, upon recovery of the land by the landlord in ejectment, he can not make entry upon the houses. Toronto Hospital v. Denham, 31 Up. Can. C. P., 203 (1880).]

[Where a decree for the sale of land excepted a sawmill thereon, a purchaser at the sale acquires no title to the mill although it is a part of the realty, and although no reservation was made in the notice of sale nor in the deed. First Nat. Bank of Braddock v. Hyer, 46 W. Va., 13 (1899).]

[A bequest of fixtures to trustees to be used in connection with the mines upon which they are situated, is a severance. Ward v. Dudley (1887), 57 Law T. R., 20, 21.]

[Where plaintiffs levy upon lands and goods, and the defendant claims exemption of the growing crops, which are appraised without objection from the plaintiffs, this constitutes a severance; and the plaintiffs afterwards purchasing the land, can not assert right to the crops. Hershey v. Metzgar, 90 Pa. St., 217, 220 (1879).]

[A sale of a mature crop, no longer drawing nutriment from the soil, operates as a constructive severance as against a subsequent purchaser of the land at a foreclosure sale. First Nat. Bank of Clay Centre v. Beegle, 52 Kan., 709, 711 (1894).]

[A mortgage of crops by a mortgagor of the realty in possession is, in law, such a severance of them that they will not pass at a subsequent sale under the mortgage of the realty. White v. Pulley, 27 Fed., 436, 442 (U. S. C. C., Ala., 1886).]

[An agricultural lien on crops, given by a tenant, effects severance as

against a purchaser of the land on execution sale. Dail v. Freeman, 92 N. C., 351, 357 (1885).]

[A conveyance of land, except an undivided one-fourth of a brick factory standing upon a part of the land, does not make the factory personal property. Allen v. Scott, 38 Mass., 25, 28 (1838).]

[A sale, by a landlord, of a building in possession of a tenant, does not convert the building into personal property as between such purchaser and the tenant. Riewe v. McCormick, 11 Neb., 261 (1881).]

[A mill and fixtures, being excepted from a conveyance, does not alter their character so as to make them subject to levy and sale as personal property. Davis v. Eastham, 81 Ky., 116, 117 (1883).]

[Where the grantor of a farm reserves, in the deed, the wheat thereon, and, on the same day, sells to the grantee all the personal property situate on the farm, the growing wheat will not pass, as, although theoretically separated, it was still a part of the soil. Holderman v. Miller, 102 Ind., 356, 363 (1885).]

[Fixtures permanently annexed to the soil by the owner are not constructively severed by a bill of sale not under seal. Dudley v. Foote, 63 N. H., 57, 60 (1884).]

[A chattel mortgage of fixtures attached to a homestead, which does not comply with the requirements of the statute relating to conveyance of homesteads, is invalid and not a severance. Gentry v. Bowser, 2 Tex. Civ. App., 388, 391 (1893).]

[A chattel mortgage of a two-story hotel, by the owner of the land, is void. Beeler v. C. C. Mercantile Co., 70 Pac., 943, 945 (Idaho, 1902).]

But such a severance can not be made by the levy of an execution by a creditor. See Hemenway v. Cutler, and other cases cited *ante*, in this section.

[A levy upon a growing crop of a tenant is a constructive severance as against the landlord subsequently recovering possession for non-payment of rent. Russell v. Moore (1880), 8 L. R., Ire., 318.] In Bank of Lansingburg v. Crary, which was the case of a chattel mortgage of growing grass, etc., the chattel mortgage given by the owner of the fee was considered not to work a severance till it became absolute by non-performance of the condition, the mortgagor before that time being the owner in fee of the land, and also the legal owner of the grass, with the right of possession of the grass, and an interest therein, and until forfeiture, the ownership of land and grass not being separated. See, also, Burk v. Hollis (*supra*). [Kimball v. Sattley, 55 Vt., 285, 292 (1883).]

The point does not seem to have been distinctly raised and discussed in subsequent cases, though chattel mortgages have been held in a number of cases to work a severance, and to prevent a chattel from becoming a fixture by annexation to the land. See Ford v. Cobb, and other cases cited in chap. 9 and notes; Griffin v. Allen, Sup'r Ct. of Buffalo (1857); 2 Clint., N. Y. Dig., 1415, pl. 47; Gooding v. Riley, 50 N. H., 400 (1870), and cases therein cited. Probably the point would not now be decided, as in 1 Barb., 542. [Where grass belongs to one not the owner of the land, he can give a chattel mortgage thereof. Jencks v. Smith, 1 N. Y., 90, 91 (1847).]

[*46] *by agreement of the owners and other parties interested in the land and fixtures, become detached and converted into personalty, as between such parties.[1] And they may in like manner,

Where a building was sold by the owner of the land, and paid for by the vendee, to be removed by a certain day designated, *held,* in the absence of any clause of forfeiture of the building, on failure to remove by that day, that it was not thereby forfeited by the vendee. Davis v. Emery, *supra.* See, also, Hoit v. Stratton Mills, *supra.* [Stackpole v. Eastern R. R., 62 N. H., 493, 494 (1883). Where the grantor of land reserved the right to remove a building thereon before a certain time, but there was no agreement that the house was to be taken in the nature of a chattel if not removed before that time, the house passes with the freehold if not removed by the date fixed. Brown v. Fox, 33 N. Y. Supp., 57 (1895).]

[1] Harlan v. Harlan, 20 Penn. St., 303 (1853); Hensley v. Brodie, 16 Ark., 511 (1855). See this subject more fully considered in chap. 3. [Banfill v. Twyman, 71 Ill. App., 253, 256 (1896), aff'd 172 Ill., 123 (1898); Medley v. People, 49 Ill. App., 218, 223 (1892); Tyson v. Post, 108 N. Y., 217, 221 (1888), aff'g 22 N. Y. Wkly. Dig., 492 (Supr. Ct., 1885); Bennett v. Bagley, 29 Supr. Ct. (22 Hun), 408, 410 (N. Y., 1880); Corcoran v. Webster, 50 Wis., 125 (1880).]

[At an execution sale, there being some question whether an engine, boiler and machinery were a part of the land upon which they were situated, the judgment debtor, judgment creditor, and the sheriff agreed that they were personal property, and they were bought as such by the judgment creditor, who also bought the land, and the articles were removed. Another creditor subsequently redeemed the land. *Held,* that the redeeming creditor could not claim the articles as a part of the land. Bennett v. Bagley, 29 Supr. Ct. (22 Hun), 408, 410 (N. Y., 1880).]

[Where an agreement to buy an engineering establishment for $480,000 was entered into, and the buyer gave a mortgage to secure $440,000 of the purchase price, whatever had received the impress of a fixture under this transaction could not be dissevered by the subsequent acts of the parties in giving a deed to real estate for $203,000 and a bill of sale of chattels, machinery, tools, engines, fixtures, etc., for $277,000. Morris's App., 88 Pa. St., 368, 384 (1879).]

[Where the owner of land mortgages it, and gives a chattel mortgage upon fixtures which would otherwise be a part of the realty, the giving of a subsequent mortgage of the land without reserving the fixtures, would indicate an intention to reunite the property constructively severed; and when the chattel mortgage expires, the increased value attaches to the land, and is not intercepted by an execution against goods. Carson v. Simpson, 25 Ont., 385 (1894).]

[Where a hotel was conveyed by deed, and the fixtures therein by a bill of sale to the same person, this is not a constructive severance in the absence of intention; and the act of the vendee in permitting the fixtures to remain annexed, negatives the idea of an intent to sever; and, if this

without express agreement, retain the character of chattels, if so treated by all parties in interest.[2]

is not so, the subsequent conveyance of the hotel, without mentioning the fixtures, shows an intent to reannex. Solomon v. Staiger, 65 N. J. Law, 617, 619 (1900).]

[2] See Trappes v. Harter, 2 Cr. & M., 153 (1833); s. c., 3 Tyr., 603; and the cases cited *post* in Chap. 3 [p. *72. St. Joseph Co. v. Wilson, 133 Ind., 465, 471 (1892); Malott v. Price, 109 Ind., 22, 25 (1886); Price v. Malott, 85 Ind., 266, 269 (1882); Keeney v. Whitlock, 7 Ind. App., 160 (1893); Earley v. Withers, 1 Pearson, 248 (Pa., 1864); see, also, McKinley v. Smith, 25 Ill. App., 168, 175 (1886)]. See, however, Hemenway v. Cutler, and other cases cited in note *post* in this section. [Where officers of the law treat articles as severed from the realty, first selling them as chattels, and three months later selling the land to parties who acquiesced in the previous sale, such articles will not pass with the land although remaining thereon, and although they might have passed ordinarily under a sale of the land. The officers stand in the place of the owners, and their acts effected a severance with the implied assent of the purchasers, and the latter can not maintain trespass for the removal of the articles. Banfill v. Twyman, 71 Ill. App., 253, 257 (1896), aff'd 172 Ill., 123 (1898). Where a tax collector has authority to seize real property but not personal property for unpaid taxes, and he attaches, as personal property, an engine, boiler and machinery, accidentally severed by the burning of the mill, for taxes upon the mill, he recognizes the change in the character of the property; and, as personal property, it is free from the lien upon the mill. State v. Goodnow, 80 Mo., 271, 275 (1883).] In Adams v. Lee, 31 Mich., 440 (1875), certain machinery substantially annexed to the building, was owned by H., the real estate being owned by K. K. afterwards conveyed an undivided one-fourth of the real estate to H., and H. sold to K. an undivided one-half of the machinery, so that K. then owned three-fourths of the land and one-half of the machinery, and H. owned one-fourth of the land and one-half of the machinery. Afterwards K. sold an undivided one-fourth of the land and his one-half of the machinery to W. G. K., which made H. and W. G. K. owners of the undivided one-half of the land and the whole of the machinery. Subsequently H. sold and conveyed to W. G. K. an undivided one-fourth of the land, and on this sale W. G. K. gave back to H. a mortgage on the undivided one-half of the land to secure unpaid purchase money, the machinery not being mentioned in this mortgage. On the foreclosure of this mortgage the premises were sold to L., who claimed the machinery as fixtures. The plaintiff claimed the machinery by a purchase of it as personal property from W. G. K. previous to the foreclosure. *Held*, that there having been at no time a unity of ownership in the land and machinery, no one of the parties having had an interest in the land co-extensive with his interest in the machinery, the titles to the two being distinct, the machinery remained personalty, and did not pass by the mortgage. Cooley, J.: "The

As to the effect of the severance of fixtures, it is clear that when done by the owner of the freehold, with the intent to convert into chattels, the articles severed become personal prop- [*47] *erty.[3] So, where done by a stranger, or one not having the right to sever, the thing severed becomes the personal property of the owner of the freehold, if he so elect, as by bringing replevin, trover, or trespass *de bonis asportatis*.[4] And in those

fact that the owner of the thing affixed to the freehold has an undivided interest in the latter, cannot render the former a fixture, when the interests are different in extent. A thing can not, as to an undivided interest therein, be real estate, and as to another undivided interest, be personalty; it must be one thing or the other.'' [Schellenberg v. Detroit Heating Co., 130 Mich., 439, 441 (1902); Lansing Iron Works v. Walker, 91 Mich., 409, 413 (1892); Scudder v. Anderson, 54 Mich., 122, 126 (1884); see, also, McDonald v. Shepard, 25 Kan., 112, 115 (1881).]

[3] Bliss v. Misner, 2 Hun, 391 (1874), saws, belting, etc., which, when severed, were held capable of sale by parol. [See, *post*, p. *303. Beach v. Allen, 14 Supr. Ct. (7 Hun), 441 (1876); Connor v. Squiers, 50 Vt., 680, 683 (1878); Patton v. Moore, 16 W. Va., 428, 437 (1880).]

[Old iron which has been used on a railway, and cast off as unfit for further use, is subject to seizure under a writ *de bonis*. Wyatt v. Levis & K. R. R. Co., 6 Que. L. R., 213 (1880).]

[Stones taken from their natural places upon a farm and piled up, become chattels. Likewise, lumber from a building torn down. McCarthy v. McCarthy, 20 Can. Law T., Occ. N., 211, 212 (1900).]

[Manure scraped up by the landowner from a farm-yard, and placed in heaps upon an adjoining field for the purpose of being removed by a buyer thereof, is sufficiently severed as not to pass to a grantee of the farm without notice of the sale. French v. Freeman, 43 Vt., 93, 97 (1870).]

[4] Morgan v. Varick, 8 Wend., 587 (1832); Rogers v. Gilinger, 30 Penn. St., 185 (1858); Bulkley v. Dolbeare, 7 Conn., 232 (1828); Gardner v. Finley, 19 Barb., 317 (1855); Farrant v. Thompson, 5 B. & Ald., 826 (1822); see, also, 1 Brownl. & Goldsb., 42, where it is stated that by the common law the lord of the manor may come and take away a tree cut down upon the copyhold land by his copyholder, without any special custom for it. [Schulenberg v. Harriman, 88 U. S., 44, 64 (1874); McNally v. Connolly, 70 Cal., 3, 6 (1886); McGinnis v. Fernandes, 32 Ill. App., 424, 425 (1889); Central Branch R. R. Co. v. Fritz, 20 Kan., 430, 437 (1878); Luce v. Ames, 84 Me., 133, 134 (1891); Nelson v. Graff, 12 Fed., 389 (U. S. C. C., Mich., 1882); Gasco v. Marshall, 7 Up. Can. Q. B., 193, 196; see, also, Agate v. Lowenbeim, 57 N. Y., 604, 614 (1874); Connor v. Squiers, 50 Vt., 680, 683 (1878); and, *ante*, p. *44.]

[Fixtures removed with the consent of the mortgagee, but without the consent of the mortgagor, become personal property freed from the lien

States where the giving of a mortgage upon land is held to be a conveyance thereof to the mortgagee, the same rule is applied in case of the severance and removal of fixtures by the mortgagor or other persons; and such fixtures are in such case recoverable by the mortgagee as personal property.[5]

of the mortgage, and the mortgagor can recover damages for such trespass; and subsequent foreclosure proceedings are inoperative as to such fixtures. Hill v. Gwin, 51 Cal., 47, 50 (1875).]

[A granary, removed from a homestead, by a trespasser, may be treated by the owner as exempt personal property, and a judgment against the trespasser is also exempt. Wylie v. Grundysen, 51 Minn., 360, 362 (1892).]

[5] See Smith v. Goodwin, 2 Me., 173 (1822); Hemenway v. Bassett, 13 Gray, 378 (1859); Gore v. Jenness, 19 Me., 53 (1841), timber; see, also, the cases cited *post* in Chap. 9. [DeLacy v. Tillman, 83 Ala., 155 (1887); Steed v. Knowles, 79 Ala., 446, 448 (1885); Gill v. Weston, 110 Pa. St., 305, 316 (1885); see, also, Vann v. Lumsford, 91 Ala., 576, 583 (1890); *Re* Bruce, 9 Benedict, 236 (U. S. Dist. Ct., Vt., 1877); Scottish Am. Co. v. Sexton, 26 Ont., 77, 79 (1894); Harris v. Malloch, 21 Up. Can. Q. B., 82 (1861); Anderson v. McEwen, 9 Up. Can. C. P., 176; Brown v. Brookfield, 24 Nova S., 476 (1892).] The mortgagee, however, as it seems, takes the proceeds of timber cut on the mortgaged premises, subject to liability to account therefor, if the premises are redeemed. Gore v. Jenness (*supra*). See Hutchins v. King, *post*, in this section.

But where the mortgagors severed an engine put by them in a mill on the mortgaged premises after the execution of the mortgage, and shipped it accompanied by a bill of lading to an agent for sale, who sold it and endorsed the bill of lading to a *bona fide* purchaser without notice, *held*, that though a fixture, the bill of lading in regard to the transfer of the property, like a bill of exchange, was good unless affected by notice, and that therefore trover did not lie by the mortgagees against the vendee. Cope v. Romeyne, 4 McLean, 384 (1848).

[Where a mortgagor of land moved a house therefrom, it is proper to decree a sale of the house in its new situs, with leave to the purchaser to roll the building off again, it not appearing that the building was attached to the freehold. Turner v. Mebane, 110 N. C., 413 (1891).]

[Where machines were severed to prevent the mortgagee claiming them, and he, under a mistake of fact, consents to an order for the sale of the machinery, such order will be set aside. Huddersfield Banking Co. v. Lister [1895], 2 Ch., 273.]

[Where a second mortgagee of a sawmill required the mortgagor to insure the machinery for the benefit of the second mortgagee, he will acquire no superior right to the insurance-money over the first mortgagee where such machinery was a part of the building. Carr v. Fire Assurance Ass'n, 14 Ont., 487 (1887).]

In the case of mere liens upon land to which are annexed fixtures, there is, however, a considerable diversity of opinion as to the effect of severance. While in general, as against third parties, the owner of the land subject to the lien may detach the fixtures and convert them again into personalty, yet, according to one class of authorities, neither he nor his assignee, nor a stranger can do so, so as to divest such fixtures from the lien, without the consent of the party entitled to the benefit thereof.[6] [*48] And in some of those States where a mortgage *is considered a mere security and not a conveyance of the land the same rule has been considered applicable.[1] In such a case the

[6] Latham v. Blakely, 70 N. C., 368 (1874), where, after an execution had been levied upon the land, the execution debtor detached fixtures. [Becker v. Whitmer, 1 Pearson, 524 (Pa., 1862); Second Nat. Bank v. Hatch, 24 Wash., 421 (1901); see, also, Kendall Mfg. Co. v. Rundle, 78 Wis., 150 (1890).] Gray v. Holdship, 17 S. & R., 413 (1828), where the severance was made by a third party. [Brown v. Sage, 11 Gr. Ch., 239, 244 (Ont., 1865); Phillips v. Myers, 55 Iowa, 265, 268 (1880).]

See, also, Heaton v. Findlay, 12 Penn. St., 307 (1849); Goff v. O'Connor, 16 Ill., 421 (1855); Hutchman's Appeal, 27 Penn. St., 209 (1856), per Knox, J.; Boyle v. Swanson, 6 La. Ann., 263 (1851). [Weed v. Hall, 101 Pa. St., 592, 596 (1882).]

[One who has the possession of and equitable title to a lot under a contract of sale, may remove buildings if done in good faith; and the vendor, having a lien for unpaid purchase money, has no right to interfere. Weed v. Hall, 101 Pa. St., 592, 596 (1882).]

[1] See Hutchins v. King, 1 Wall., 53 (1863); Witmer's Appeal, 45 Penn. St., 455, 463 (1863); Hoskin v. Woodward, 45 Penn. St., 42 (1863).

See, also, Clark v. Reyburn, 1 Kan., 281 (1863). [Sullivan v. Toole, 33 Supr. Ct. (26 Hun), 203, 205 (N. Y., 1882); see, also, Betz v. Muench, 13 Atl., 622 (N. J., 1888); Seatoff v. Anderson, 28 Wis., 212, 215 (1871).]

In Hutchins v. King, which was a case coming up from New Hampshire, it was held that timber growing upon mortgaged land constituted a portion of the realty, and was embraced in the pledge of the land, and held both before and after it was cut (without the mortgagees' consent) as a portion of their security. But that when the amount due according to the stipulation of the mortgage was paid, the lien of the mortgage upon the timber thus wrongfully severed was discharged, and the property therein reverted to the mortgagor or his vendee of such timber; and that any subsequent sale of such timber by the mortgagee after such payment, was a conversion for which trover lay. In Clark v. Reyburn (*supra*), the assignee of a mortgage brought replevin for a dwelling house against the defendant who had bought the same as personal property, and to whom it had been delivered off the mortgaged premises, and while it was conceded by the

mortgagee, it is said, is to be considered as the owner of the land only so far as may be necessary in order to give him the full benefit of his security and appropriate remedies for any violation of his rights, but for no other purpose.[2] And for the purpose of giving him the full benefit of his security, it seems upon principle that he should be allowed to avail himself of any appropriate remedy, whether at law or in equity, and that the mortgagor ought not to be allowed at pleasure to withdraw a fixture which had hitherto constituted a portion of the mortgagee's security from the lien of mortgage without the mortgagee's consent thereto, and that if severed without *such [*49] consent, such fixtures should still remain subject to such lien. The more numerous class of cases, however, seems to lay down the rule that unless such severance would impair the mortgagee's security and render it of doubtful adequacy, the mortgagee has no remedy for such severance either by recaption of the article severed, action at law for such severance, or for the articles severed, or by injunction to restrain the mortgagor from making the same.[3]

court that in States where the common law on the subject had not been changed by statute, the mortgagee, for the purpose of protecting and enforcing his lien, had the remedies of an owner, though for those purposes only; yet, *held*, that the rule in that State had been changed by the statute (Com. Laws, p. 355, § 12) providing that "in the absence of stipulations to the contrary, the mortgagor of real estate may retain the right of possession thereof," and that the plaintiff not being the owner of the house, as alleged in his petition, could not maintain replevin therefor. See, also, Crippen v. Morrison, 13 Mich., 35 (1864). [When a mortgage creates a lien upon a building attached to the freehold in such a way as to make it a part of the real estate, such lien can not be defeated by removing such building to another piece of real estate; and the original mortgagee's lien is superior to that of one holding a mortgage on the land to which the building was moved, taken after such removal, and having no notice, as where the equities are equal, and neither has the legal title, the prior equity will prevail. Johnson v. Bratton, 112 Mich., 319, 325 (1897).]

[2] See Hutchins v. King, and Clark v. Reyburn (*supra*). [Hill v. Gwin, 51 Cal., 47 (1875); Lavenson v. Standard Soap Co., 80 Cal., 245 (1889); Tomlinson v. Thompson, 27 Kan., 70 (1882); Tate v. Field, 56 N. J. Eq., 35 (1897); Verner v. Betz, 46 N. J. Eq., 256, 267 (1889); Schalk v. Kingsley, 42 N. J. Law, 32 (1880); Heath v. Haile, 45 S. C., 642 (1895); Edler v. Hasche, 67 Wis., 653, 661 (1887); see, also, Vaughn v. Grigsby, 8 Colo. App., 373, 375 (1896).]

[3] See Bennett v. Allen, Supr. Ct. of Buffalo (1857), 2 Clint. Dig.

But irrespective of the question whether a judgment creditor may pursue property after severance, the proceeds of the sale on execution of machinery in a building, whether such machinery be realty or personalty, belong to the execution creditor who sells it as personalty; and the judgment creditor whose lien has attached to the realty, has no lien upon the fund raised by the sale of machinery severed from the freehold. By coming in

(N. Y.), 1416, pl. 48, 49; Peterson v. Clark, 15 John., 205 (1818); Lane v. Hitchcock, 14 John., 213 (1817); Gardner v. Heartt, 3 Den., 232 (1846); Yates v. Joyce, 11 John., 136 (1814); Citizens' Bank v. Knapp, 22 La. Ann., 117 (1870); Buckout v. Swift, 27 Cal., 433 (1865); Cooper v. Davis, 15 Conn., 556 (1843), where it was *held*, that mill stones severed from a mill by a mortgagor before the time limited for foreclosure, and before the mortgagee had taken possession, and removed and sold, could not be reclaimed by the mortgagee by virtue of his mortgage, although the design of the mortgagor probably was to impair the security and prevent the mortgagee from collecting the full amount of his debt, and that the vendees thereof were entitled to recover in trover for their recaption. See, however, Cresson v. Stout, 17 John., 116 (1819), where it was *held*, that a mortgagee in possession may replevy machinery severed from the freehold as against a subsequent levy by an execution creditor, though it was part of the freehold when sold by the sheriff. See *post* remedies [p. *415. McKelvey v. Creevey, 72 Conn., 464 (1900); Vanderslice v. Knapp, 20 Kan., 647, 649 (1878); Harris v. Bannon, 78 Ky., 568, 570 (1880); Hamlin v. Parsons, 12 Minn., 108; Kircher v. Schalk, 39 N. J. Law, 335, 339 (1877); see, also, Weill v. Thompson, 24 Fed., 14 (U. S. C. C., La., 1885); Partridge v. Hemenway, 89 Mich., 454 (1891); Alexander v. Shonyo, 20 Kan., 705, 707 (1878); Moore v. Moran, 64 Neb., 84 (1902); Hamilton v. Austin, 43 Supr. Ct. (36 Hun), 138, 143 (N. Y., 1885); Reynolds v. Deckman, 2 Can. Law T., 261 (Nova S., 1882); and, *post*, p. *412.]

[In The Canada, 7 Fed., 248 (U. S. Dist. Ct., Ore., 1881), the mortgagor of a vessel, while in a foreign port, removed the copper sheathing, and replaced it with new, the greater portion of the old copper being stowed in the hold and brought to this country. The mortgagee claimed it as a part of his security. *Held*, that a mortgagor has a right to dispose of old material where he makes a repair in good faith, and replaces the old material with new of equal or greater value; but if he makes no disposition of it, and suffers it to remain on board, the old material will still belong to the ship if capable of being used in some form in the navigation of the vessel. In this case, it not appearing that the copper could be of any use in the ordinary navigation of the vessel, and the master having brought it to this country because of a better market, and as the security of the mortgagee had been enhanced, the mortgagee had no claim on the old copper.]

upon the proceeds, the judgment creditor recognizes the title of the purchaser of it as personalty.[4]

If land be let with fixtures thereto annexed, or with a house or timber trees thereon, the lessee has a special property to make use of the same during his term, but the general property remains in the lessor;[5] and if the tenant severs the fixtures, *pulls down the house, or fells the timber, the lessor shall [*50] have them after such severance.[6] But if a house falls down *per vim venti,* or other act of God, in the time of the lessee for life, or for years, or in the time of the tenant in dower, by the courtesy, etc., the particular tenant has a special property in the timber to rebuild the like house as the other was for his habitation, though the general property is in the reversioner.[7] But the tenant has, as it seems, a special property in such timber for no other purpose than to rebuild the premises; and where the building is destroyed by fire, the tenant has no right to remove

[4] Hutchman's Appeal, 27 Penn. St., 209 (1856). [But see McCaskill v. Richmond Industrial Co., 23 Que., C. S., 381 (1902), as to a mortgagee, where no actual severance is made.]

[5] Bull. N. P., 33; Liford's Case, 11 Co., 48 a (1614); Bowles's Case, 11 Co., 81 b (1615); Farrant v. Thompson, 5 B. & Ald., 826 (1822).

[A lessee of premises "as a site for a building" owned by him, is entitled to the use of a stone foundation upon which his building rests and has always rested, as against a prior purchaser of the stone from the landlord, the tenant having no notice of such sale. Townsand v. Ford, 72 App. Div., 621 (N. Y., 1902).]

[Where a leased building is destroyed by fire, though the lessor is not bound to rebuild, yet any building which he might erect would become a part of the realty, and enure to the benefit of the lessee during his term. Rogers v. Snow, 118 Mass., 118, 124 (1875).]

[6] See Bowles's Case, 11 Co., 81 b (1615); Liford's Case, 11 Co., 48 a (1614); Herlakenden's Case, 4 Co., 62 a, 63 a (1589); Paget's Case, 5 Co., 76 b (1593-4); Bulkley v. Dolbeare, 7 Conn., 232 (1828); Berry v. Heard, Cro. Car., 242 (1622); Palm., 327; W. Jones, 255; 7 Term, 11; Mooers v. Wait, 3 Wend., 104 (1829); Farrant v. Thompson, 2 D. & R., 1 (1822), s. c., 5 B. & Ald., 826. [Leonard v. Stickney, 131 Mass., 541, 545 (1881); Petre v. Ferrers (1891), Weekly Notes, 171; see, also, *Ex parte* D'Eresby (1881), 44 L. T. R., 781; and, *post,* p. *432.]

[7] Bowles's Case, 11 Co., 82 a (1615); Co. Lit., 53 a; Bull. N. P., 33; Herlakenden's Case, 4 Co., 63 a (1589); Boydell v. McMichael, 3 Tyr., 974 (1834); s. c., 1 Cr. M. & R., 177. See, however, *dicta* of Bayley and Holroyd, JJ., in Farrant v. Thompson, 5 B. & Ald., 826 (1822).

fixtures rented by him with and as a part of such demised premises, to another building rented by him from a third person, and there set them up for use.[8]

[8] Pope v. Garrard, 39 Geo., 471 (1869). The articles in this case were the counters and drawers for a drug store, put in the building by the landlord. See Rev. Code, § 2192-2194. [See, *post*, p. *444.]

[Where machinery, belonging to the landlord, is severed by fire, this would not make the machinery the property of the tenant. Donkin v. Crombie, 11 Up. Can. C. P., 601, 605.]

CHAPTER II. [*51]

OF THE RIGHT TO FIXTURES, AS BETWEEN THE OWNER OF THE FREEHOLD AND A STRANGER MAKING ANNEXATIONS THERETO.

It is a rule of law of great antiquity, that whatever is affixed to the soil becomes a part of the realty, and subject to the same rules of law as the soil itself.[1]

The rule is best expressed in the words of the maxim: *Quicquid plantatur solo, solo cedit.*[2] By the Institutes of the Civil Law, it was provided that "if a man builds upon his own ground with the materials of another, he is considered the proprietor of the building, because everything built on the soil accedes to it.[3] The owner of the materials does not, however, cease to be the owner; only while the building stands he can not claim the materials, or demand to have them exhibited, on account of the law of the Twelve Tables providing that no one is to be compelled to take away the *tignum* of another, which has been made part of his own building, but that he may be made, by the action *de tigno injuncto,* to pay double the value; and under the term *tignum* all materials for building are comprehended. The object of this provision was to prevent the necessity of buildings being pulled down. But if the building is destroyed from any cause, then the owner of the materials,

[1] See Terry v. Robins, 13 Miss., 291 (1845); Broom's Leg. Max., 401; 10 Hen., 7, 2 b (1494); 20 Hen., 7, 13 (1504); 21 Hen., 7, 26 (1506); Co. Lit., 53 a, and generally the authorities cited throughout this volume. [See Gough v. Wood [1894], 1 Q. B., 713, 719.]

[2] In several of the old books the word "*fixatur*" is used as synonymous with "*plantatur.*" See Climie v. Wood, L. R., 3 Exch., 260 (1868), per Kelly, C. B.

[3] *Quia omne quod inaedificatur solo cedit.* See Bract. Lib., 2, chap. 2, §§ 4, 6, fol. 9 b, 10; Fleta Lib., 3 c, 2, § 12, fol. 176.

[*52] if he has not already obtained the *double value, may reclaim the materials, and demand to have them exhibited."[4]

"On the contrary, if any one builds with his own materials on the ground of another, the building becomes the property of him to whom the ground belongs. But in this case the owner of the materials loses his property, because he is presumed to have voluntarily parted with them, that is, if he knew he was building upon another's land; and, therefore, if the building should be destroyed, he cannot even then reclaim the materials. Of course, if the person who builds is in possession of the soil, and the owner of the soil claims the building, but refuses to pay the price of the materials and the wages of the workmen, the owner may be repelled by an exception of *dolus malus*, provided the builder was in possession *bona fide*. For if he knew that he was not the owner of the soil, it may be said against him that he was wrong to build on ground which he knew to be the property of another."[5] These provisions have been made the basis, with more or less variation therefrom, for corresponding regulations in several modern codes;[6] and in some respects to be hereafter pointed out, have been adopted by the common law of England and the United States, though not to their full extent. Britton,[6] in treating the subject, says: "A purchase or acquisition may also accrue from the fraud and folly of another, as where persons, by malice or ignorance, build with their own timber on another's soil, or where they plant or engraft trees,

[4] Inst. 2, 1, 29 (Sandars' Ed.); D., 41, 1, 7, 10; id., 47, 3, 1. *Praeterea id quod in solo nostro ab aliquo aedificatum est, quamvis ille suo nomine aedifi caverit, iure naturali nostrum fit, quia superficies solo cedit. Gai.*, 2, 73.

[5] Inst. 2, 1, 30, Sandars' Ed.; D. 41, 1, 7, 12.

See Code Nap., §§ 554, 555; Civil Code of La., Art. 499, 500; 2 Ersk. Inst. t. 1, § 15; 3 id. t. 1, § 11; Bell Com., § 937; Miller v. Michoud, 11 Rob. (La.), 225 (1845); Poche v. Theriot, 23 La. Ann., 137 (1871); Slack v. Gay, 22 id., 387 (1870). [See Jackson v. Ludeling, 99 U. S., 513 (1878).]

[But if a building is permanently fixed upon another man's ground, the builder believing the ground to be his own, he may reclaim the materials when, from any cause, such building is demolished. Hadley's Roman Law, 172.]

[6] Book 2, ch. 2, sec. 6, p. 85 b. (Nichols' ed., vol. 1, p. 217). See, also, Bract. Lib. 2, chap. 2, §§ 4, 6, fol. 9 b. 10. Fleta Lib. 3, c. 2, § 12, fol. 176.

or sow their grain in another's land without the leave of the owner of the soil. In such cases what is built, planted and sown, shall belong to the owner of the soil upon the presumption of a gift; for there is a great presump*tion that such build- [*53] ers, planters or sowers, intend that what is so built, planted or sown, should belong to the owners of the soil, especially if such structures are fixed with nails, or the plants or seeds have taken root. But if any one becomes aware of his folly, and speedily removes his timber or his trees before our prohibition comes against his removing them, and before the timber is fastened with nails, or the trees have taken root, he may lawfully do so." This statement of the law, as will be seen in the course of the chapter, is in most respects the law of England and the United States at the present day.

The distinction recognized by the Roman civil law between the cases of erections *alieno solo,* made by one in possession *bona fide* and without notice of any adverse title, and those made by one who knew that he was not the owner of the soil, has not been generally adopted by the common law of England or the United States, according to the strict rule of which the owner of the soil recovered it in ejectment without being subject to the obligation of paying for improvements made thereon by the adverse possessor, such improvements being regarded as annexed to, and forming a part of, the freehold.[7] An adverse possessor makes improvements upon the land at his peril, and such improvements constituting a part of the soil do not even constitute a sufficient consideration to support an express promise by the owner of the land to pay for them.[8] However, after recovery in ejectment, in an action at law for the *mesne* profits, which is a liberal and equitable action allowing of every kind of equitable defence,[9] it is held that the value of permanent and valuable improvements made in good faith by the *bona fide* possessor, may be recouped to the extent of the rents and profits claimed by the plaintiff.[10] And a court of equity, in a bill for

[7] 2 Kent Com., *334; Blackw. Tax Titles, 587.

[8] Frear v. Hardenbergh, 5 John., 272 (1810).

[9] Per Kent, J., in Murray v. Gouverneur, 2 John. Cas., 442 (1800).

[10] See 2 Kent Com., 335; Coulter's Case, 5 Co., 30 b (1598); Green v. Biddle, 8 Wheat., 81, 82 (1823); Hylton v. Brown, 2 Wash. C. C., 165

[*54] rents and profits after a recovery at *law against a *bona fide* possessor for a valuable consideration, will deduct from the amount to be paid the value of beneficial improvements.[11] A court of equity will in some other cases allow compensation for improvements made by a *bona fide* possessor, on the ground that it would be a fraud for the owner of the land to avail himself thereof without making compensation.[12]

The subject has also, to some extent, been regulated by statutes, variously denominated "betterment," "improvement," and "occupying claimant" laws, enacted for the purpose of remedying in some respects the harshness of the common law rule, and more nearly assimilating it to the equitable rules of the civil law upon this subject.[13]

To the maxim *quicquid plantatur*, &c., before quoted, there are, however, even at the common law, various exceptions which have been rendered necessary by, and have accordingly come into existence with, the increase in importance of personal property, and the trades connected therewith. These exceptions will be considered in their proper places in the course of the work.

With reference, however, to the subject of this chapter, which relates to questions arising between the owner of the freehold and strangers, *i. e.*, persons sustaining no contract relations, ex-

(1808); Jackson v. Loomis, 4 Cow., 168 (1825); Dowd v. Fawcett, 4 Dev., 95 (1833).

[The right of the defendant to an allowance for fixtures can not be impaired by plaintiff permitting former lessees of the defendant to remove a portion of the fixtures. Ege v. Kille, 84 Pa. St., 333, 341 (1877).]

[11] Green v. Biddle, 8 Wheat., 77 (1823); Bright v. Boyd, 1 Story, 478, 495 (1841); Herring v. Pollard, 4 Humph., 362 (1843); Mathews v. Davis, 6 Humph., 324 (1845); 2 Kent Com., 335.

[12] See 1 Story's Eq. Jur., § 388; 2 id., § 1237; Blackw. Tax Titles, 587 *et seq.*, and cases cited, for a more full discussion of the subject, any further consideration of it here being beyond the scope of this work. In Atty. General v. Baliol College, 9 Mod., 411 (1744), there is a dictum per Ld. Hardwicke, that "where a man suffers another to build upon his land, and stands by and makes no objection, or shows his title * * * the maxim in such cases is, *solum cedit aedificio;* * * * those decrees have been where a man builds upon another's land having no title." See, also, 1 Story's Eq. Jur., §§ 388, 389, and cases cited.

[13] See Blackw. Tax Titles, 590 *et seq.;* Rev. Stats. Ill. (1874), p. 449, §§ 55 *et seq.;* 2 Comp. Laws Mich. (1871), §§ 6252 *et seq.*

press or implied, with the owner of the soil, the rule is applied with considerable rigor. With respect to erections or additions made by the owner of the soil with the *materials of [*55] another, it is held, that so long as the identity of the original materials can be proved, the right of the original owner in the property is preserved, and is not gained by another by accession. The owner may pursue his property wherever he can trace it. But when the property has lost its identity, it ceases to have a legal existence as a chattel and may not be recaptured.[14]

[14] Cross v. Marston, 17 Vt., 533 (1846); White v. Twitchell, 25 Vt., 620 (1853). In this case it was held that a bar or pole tortiously taken and used in making a staging to shingle a barn, being simply secured in its place by a nail, was not lost to the owner, who might recapture it without notice to the taker, doing no more damage to the staging than was necessary to repossess it. In Cross v. Marston, *supra*, a case of drawers and the sash of a show case were, by the consent of the owner of them, placed in a building which was being fitted up by its owner for a book store, and the case of drawers was by the owner of the building fastened by nails to the wall, and the sash was used to cover an open book case permanently fastened to the wall of the building, the sash sliding in a place before the book case and fastened in by strips of boards fastened above and below, both case and sash being fastened in such a manner that they could be removed without injury to the building or themselves. The owner of the building then leased it for a book store, and it was occupied by the lessee as such for five years, the articles in question remaining in the same situation, when the owner of the building leased it in the same condition to the defendant, who occupied it as lessee for four years, when the owner sold and conveyed the premises to him by warranty deed, describing the premises as "the land and building thereon standing with the appurtenances," etc. *Held*, that the case and sash still remained the personal property of the original owner, and that he might recover them in trover against the purchaser of the building, the articles being mainly a part of the furniture of the building, and not so attached to the freehold as to have lost their identity.

[A house placed by a wrongdoer upon a stone foundation upon his own land, but which can be removed without injury to the house or to the land, can be recovered by its owner. Central Branch R. R. Co. v. Fritz, 20 Kan., 430, 439 (1878).]

[Saw-mill machinery which is, without the consent of the owner, taken and attached to realty by the landowner, remains personal property. Gill v. DeArmont, 90 Mich., 425, 430 (1892).]

[The manufacturers of a machine consigned it to themselves in care of a contractor for the purpose of having it tested in a mill for which the contractor had agreed to furnish such a machine. The contractor placed the machine in position, and attached it to the floor by screws, and

connected by belting with the shafting. The millowners had notice of the facts. *Held*, that the machine had not been so incorporated with the building as to lose its identity, and that the manufacturers had not lost their property therein. Walker v. Grand Rapids Mill Co., 70 Wis., 92 (1887).]

[Where an ice machine is attached to realty by the landowner without the consent of the owner of the chattel, it remains personal property as between the parties. San Antonio Brew. Ass'n v. Arctic Mach. Co., 81 Tex., 99, 103 (1891).]

So, a cloth covering to the bed of a billiard table, which is so attached upon and fastened to the table as to be capable of being removed without injuring the table, is not so annexed thereto by accession as to be inseparable by one who put it there under a contract of sale, which he has a right to rescind on account of fraud. Perkins v. Bailey, 99 Mass., 61 (1868); see, also, Betts v. Lee, 5 John., 348 (1810); Mills v. Redick, 1 Neb., 437 (1871); Stevens v. Briggs, 5 Pick., 177 (1827); 2 Kent Com., 363; D'Eyncourt v. Gregory, L. R., 3 Eq., 382, 394 (1866).

[Motors, controllers, and poles upon electric cars, which can be removed, leaving the cars as they were originally, and which can be applied to any street railway car, do not pass under a prior mortgage covering the cars, title to the apparatus having been retained by the seller thereof. General Electric Co. v. Transit Co., 57 N. J. Eq., 460, 465 (1898).]

[The sale of a dredge "and appurtenances" does not include a pump temporarily attached thereto. Gullman v. Sharp, 88 Supr. Ct. (81 Hun), 462 (N. Y., 1894).]

See the subject of title by accession further considered, with reference to the subjects of alluvion, confusion and admixture of goods, etc., in Inst., Lib. 2, t. 1, § 20, *et seq.;* Gai., 2, 70, *et seq.;* Code Nap., § 556, *et seq.;* Bell Com., § 934, *et seq.;* 2 Ersk., Inst., t. 1, § 14; 2 Black. Com., 261, 404; 2 Kent Com., 360; 3 id., 428; Am. Law Journ., 307; Gifford v. Yarborough, 5 Bing., 163 (1828); S. C., in K. B., 3 B. & C., 91; Blewitt v. Tregonning, 3 Ad. & E., 554 (1835). [Lacrustine Fertilizer Co. v. Lake Guano Co., 82 N. Y., 476, 481 (1880), aff'g 26 Supr. Ct. (19 Hun), 47, 52 (1879); Boileau v. Heath [1898], 2 Ch., 301, 305.]

[Where the third story of a building is conveyed for the life of the building, and the building is destroyed by fire leaving the walls standing, the walls of the third story become the property of the owner of the land and the two lower stories. Ainsworth v. Lakin, 180 Mass., 397, 398 (1902).]

[That wild bees and honey in a tree belong to the landowner, see Fisher v. Steward, Smith, 60, 61 (N. H., 1804).]

Where large masses of stone had from time to time fallen from some cliffs above upon copyhold land, and had become, some wholly, some partially, and some not at all, imbedded in the earth, there being no evidence to show when any particular portion had fallen, but the last fall having been some thirty or forty years ago, and prior to the time the defendant took the copyhold, it was *held*, that they were a portion of the soil and

*But its physical identity need not in all cases be so lost [*56] that it is incapable of being restored into its original condition: thus, if a man should convert a quantity of bricks, and erect them into a house, these bricks would have lost their legal identity as chattels, and would be incapable of legal recaption by their original owner, though perhaps physically capable of being restored to their original condition.[1] The nature of the

the property of the lord, and if removed by the copyholder, trover would lie therefor. Dearden v. Evans, 5 M. & W., 11 (1839). See 3 Campb. Lives of the Chief Justices, 26 note, where reference is made to a French decision, that a stone falling from the heavens belongs to the finder, and not to the owner of the field in which it falls. [See, also, 20 Albany Law J., 299 (1879); 13 Irish Law T., 381 (1879); 4 Rev. Leg., 424 (1898). An aerolite belongs to the owner of the soil. Goddard v. Winchell, 86 Iowa, 71 (1892). Aerolites upon a highway belong to the owner of the fee. Maas v. Amana Soc., Chicago Tribune of July 9, 1877, p. 2 (Iowa, 1877); s. c., 16 Albany Law J., 76.]

[A boat embedded in the soil about two thousand years belongs to the owner of the land. Elwes v. Brigg Gas Co. (1886), 33 Ch. D., 562.]

[Gold bearing quartz buried in the ground belongs to the landowner as against the lessee who found it. Ferguson v. Ray, 77 Pac., 600 (Ore., 1904).]

[See, also, South Staffordshire Waterworks v. Sharman (1896), 65 L. J., Q. B., 460, where two gold rings found by a laborer in some mud thrown out while cleaning a pool, were held to belong to the landowner. And see Burdick v. Chesebrough, 94 App. Div., 532, 537 (N. Y., 1904); 7 Law Notes, 160 (N. Y., 1903), that dishes buried about one hundred and fifty years ago belong to the landowner as against his lessee who found them.]

[When the water of a flowing stream is congealed, the ice attached to the soil constitutes a part of the land, and belongs to the owner of the bed of the stream. Washington Ice Co. v. Shortall, 101 Ill., 46, 55 (1881). See, further, on the subject of ice: Brooklyn v. Smith, 104 Ill., 429, 439 (1882); Brookville Co. v. Butler, 91 Ind., 134 (1883); Julien v. Woodsmall, 82 Ind., 568, 572 (1882); State v. Pottmeyer, 33 Ind., 402, 403 (1870); Marsh v. McNider, 88 Iowa, 390, 395 (1893); Slingerland v. International Contracting Co., 43 App. Div., 215, 224 (N. Y., 1899); Swan v. Goff, 39 App. Div., 95 (N. Y., 1899); Dodge v. Berry, 33 Supr. Ct. (26 Hun), 246, 248 (N. Y., 1882); Myer v. Whitaker, 55 How. Pr., 376, 380 (N. Y., 1878); Reysen v. Roate, 92 Wis., 543, 544 (1896).]

[1] Cross v. Marston, 17 Vt., 533, 540 (1845), per Hebard, J. See, also, Peirce v. Goddard, 22 Pick., 559 (1839); Moore, 20; Bro. Abr. tit. Trespass pl. 23; 2 Kent Com., 363. [See, also, Strubbee v. Cincinnati R'y, 78 Ky., 481, 486 (1880).] In Brooke's Abr. Trespass, pl. 23, above cited, it is said that "if a piece of timber, which was illegally taken from J. S., has been hewed, trespass does not lie against J. S. for retaking it. But

if a piece of timber, which was illegally taken, has been used in building or repairing, this, although it is known to be the piece which was taken, can not be retaken, the nature of the timber being changed; for, by annexing it to the freehold, it becomes real property."

[The owner of building material executed a bill of sale of the same, but retained possession. Such material was in an uncompleted house of the seller, and he affixed part of it to the house, and then sold the house to one who, in good faith, believed that the material passed with the land, and who used a part thereof in completing the building. *Held*, that the buyer of the building material could not recover from the grantee for the property affixed to the freehold. Geirke v. Schwartz, 45 N. Y. Supp., 928 (1897).]

[Where ties have been taken by a sub-contractor for the construction of a railroad, the owner thereof can not recover from the railroad company after the road has been turned over to it as realty, although the ties can be identified, the company not having been a party to the conversion. Detroit & B. C. R. R. Co. v. Busch, 43 Mich., 571 (1880).]

[Where a house is stolen from a lot after a foreclosure sale, but before the time of redemption has expired, and annexed to an adjacent lot, whatever equitable lien the purchaser at the foreclosure sale might have had upon such house, is lost by a delay of a year and eight months during which time the house has passed into the hands of an innocent purchaser. Fisher v. Patterson, 197 Ill., 414, 417 (1902), aff'g 99 Ill. App., 70 (1900). See, also, Nicholson v. New Zealand Bank, 12 N. Z. L. R., 427, 440 (1894), in regard to iron water pipes.]

[Where a contractor, who had agreed to construct a mill for landowners, bought machinery therefor under an agreement that the seller was to retain property therein until paid, but the seller knew that the machinery was to be put into a mill of third persons, the seller will be estopped from asserting that the contractor had no title to the machinery as against the landowners, who, without notice, had advanced money on the contractor's account. Jenks v. Colwell, 66 Mich., 420 (1887).]

In Shoemaker v. Simpson, Supr. Ct. of Kansas (1875), 3 Cent. Law Jour., 132, the property, railroad iron, was annexed to the land without the consent either of the owner of the iron or the land, and the rule was declared to be that an innocent person can not be deprived of his title to personal property against his consent by having it attached, without his consent, to the real estate of another by a third person, where such personal property can be removed without any great inconvenience, and without any substantial injury to the real estate. [Shoemaker v. Simpson, 16 Kan., 43 (1876); Polson v. Degear, 12 Ont., 275, 280 (1886); Alexander v. Cowie, 19 N. Brunsw., 599 (1880); see, also, Cochran v. Flint, 57 N. H., 514, 544 (1877).]

[Bricks and rails were upon land at the time it was sold on execution. Afterwards, a tenant of the purchaser used the bricks to build a chimney, and the rails to build a fence. *Held*, that the original owner of the land should make a demand for the privilege of removal, and, in case of refusal,

material and its legal identity would seem sufficiently changed by its employment for the purpose for which it was manufactured, where it can not be separated from the realty without material injury to itself and the realty. And, though such building should afterwards be destroyed from any cause, it is believed that, by the common law, the materials so convert*ed [*57] would not revest in, and could not be then reclaimed by their original owner, as would be the case by the Roman civil law,[1] but would belong to the owner of the soil.[2]

an action would lie for preventing an exercise of the right to sever. Thweat v. Stamps, 67 Ala., 96, 98 (1880).]

[The lien of a recorded chattel mortgage upon machinery can not be defeated by the machinery being attached by a third party to his land. Grand Island Co. v. Frey, 25 Neb., 66, 70 (1888).]

[Where chattels are sold to the grantee of land under contract, the unpaid seller, having reserved title, does not lose his property as against the grantor. Harris v. Hackley, 127 Mich., 46 (1901). Likewise, where the buyer erroneously thinks he is entitled to purchase the land to which the chattels are annexed. Stevens Mfg. Co. v. Barfoot, 9 Ont., 692, 696 (1885). Likewise, as against the landlord, retaking possession of the premises, the buyer having been a tenant. Palmateer v. Robinson, 60 N. J. Law, 433, 437 (1897); Lange v. Pisch, 9 N. Y. Misc., 475 (1894).]

[The fact that the title to real estate is in a husband and wife jointly, who hold it by the entirety, gives the wife no interest in a boiler sold to the husband, the seller retaining title and knowing that such boiler was to be attached in a permanent way. Schellenberg v. Detroit Heating Co., 130 Mich., 439 (1902).]

[A mill-wright made a contract to furnish machinery for a grist mill. By fraudulent representations he purchased such machinery upon the credit of the mill-owners, and incorporated the machinery into the mill. The sellers of the machinery brought trover against the mill-owners. *Held*, that the machinery had become a part of the realty, and title thereto was in the mill-owners. Woodruff & Beach Iron Works v. Adams, 37 Conn., 233 (1870).]

[1] See *ante*, p. *51.

[2] See Moore v. Cunningham, 23 Ill., 328 (1866). This case does not decide the point above stated, but may serve to illustrate the subject somewhat. In this case, where one who held a contract for building a court-house, put into the walls brick not in accordance with the contract, and the county court notified the contractor to take down the defective material and work and rebuild the same, and afterwards the contract was declared forfeited and relet to claimants who were to furnish all materials except those already laid up, and who took down the walls and piled up the brick, which were levied upon by the plaintiff on execution against the original contractor, it was *held*, that the brick as fast as laid in the wall

With respect to erections and annexations made by a stranger, with his own materials upon the soil of another, without his consent, the rule of law hereinbefore stated, is, as between the owner of the soil and the one making such annexations, quite uniformly applied, that the owner of the materials loses his property because he is presumed to have voluntarily parted with it, or to have intended it as a gift to the owner of the soil.[3] Thus it has been often held that a building or other annexation placed upon the land of another without his previous consent, and without any contract with him, express or implied, that it may remain the property of the builder as a personal chattel, becomes a part of the realty, and may not be removed by the party erecting it or his vendee, as against the owner of [*58] the soil.[4] And the doctrine holds as well with respect *to

became part of the freehold, and the title to the brick vested in the county, and being taken down by subsequent contractors under directions from the county, they did not again become the property of the original contractor, and hence were not liable for his debts. [Stevens v. Barfoot, 13 Up. Can. App., 366 (1886).]

[Where a pier was erected in navigable waters with stone taken from adjoining land of which the builders were not the owners, such stone belongs to the owner of the land from which it was taken, upon his rightfully removing the pier as a nuisance. Larson v. Furlong, 63 Wis., 323, 326 (1885).]

[3] See authorities already cited, *ante* in this chapter. Also Ferard Fixt., 12. [Black v. Black, 30 N. J. Eq., 215 (1878); Houzik v. Delaglise, 65 Wis., 494 (1886).]

[4] Stillman v. Hamer, 8 Miss., 421 (1843); First Parish in Sudbury v. Jones, 8 Cush. 189 (1851); Childress v. Wright, 2 Cold., 350 (1865); Thayer v. Wright, 4 Den., 180 (1847); Goddard v. Bolster, 6 Me., 427 (1830); Treadway v. Sharon, 7 Nev., 37 (1871); this was the case of a saw mill built upon government land, on the faith of the right of preemption of the land on which it stood, but which was afterwards lost by laches, and it was *held*, that the occupant had no right to remove the same. See, also, Madigan v. McCarthy, 108 Mass., 376 (1871); Huebschmann v. McHenry, 29 Wis., 655 (1872); Mitchell v. Billingsley, 17 Ala., 391 (1850); Crest v. Jack, 3 Watts, 238 (1834); Murphy v. Marland, 8 Cush., 575 (1851); Richtmyer (or Richmyer) v. Morss, 3 Keyes, 349 (1867); s. c., 4 Abb. Ct. App., Dec., 55; 5 Abb. Pr. (N. S.), 44; 37 How Pr., 388; Beers v. St. John, 16 Conn., 322 (1844); Sparks v. Spicer, 1 Ld. Raym., 738 (1698); s. c., Salk, 648, in the former report of which it is said that "if a man be hung in chains upon my land, after the body is consumed, I shall have gibbet and chain;" Master, etc., of Clare Hall v. Harding, 6 Hare, 273, 296 (1848); Munro v. Taylor, 8 Hare, 60 (1848); Bolling v.

Whittle, Ala. Sel. Ca., 268 (1861); Wentz v. Fincher, 12 Ired. Law, 297 (1851). [Powers v. Harris, 68 Ala., 409, 411 (1880); Pomeroy v. Bell, 118 Cal., 635 (1897); Richards v. Morey, 133 Cal., 437, 440 (1901); Dunstedter v. Dunstedter, 77 Ill., 580, 582 (1875); Bonney v. Foss, 62 Me., 248, 251 (1873); Kenerson v. Colgan, 164 Mass., 166 (1895); Guernsey v. Wilson, 134 Mass., 482 (1883); Morrison v. Berry, 42 Mich., 389, 393 (1880); Welborn v. Spears, 32 Miss., 138 (1856); Jacoby v. Johnson, 120 Fed., 487, 489 (U. S. C. C. A., N. J., 1903); Doscher v. Blackiston, 7 Ore., 143 (1879); Houston, E. & W. T. R'y Co. v. Adams, 63 Tex., 200, 209 (1885); Bonner v. Wiggins, 52 Tex., 125 (1879); Missouri P. R'y Co. v. Cullers, 81 Tex., 382, 390 (1891); Nicholstone City Co. v. Smalley, 21 Tex. Civ. App., 210 (1899); see, also, Wheeler v. State, 109 Ala., 56, 60 (1895); Fischer v. Johnson, 106 Iowa, 181, 184 (1898); Bonson v. Jones, 89 Iowa, 380, 388 (1893); Commonwealth v. Brooks, 164 Mass., 397 (1895); Woods v. Wulf, 84 Minn., 299 (1901); Fortescue v. Bowler, 55 N. J. Eq., 741 (1897); Lacrustine Fertilizer Co. v. Lake Guano Co., 82 N. Y., 476, 481 (1880); Andrews v. Powers, 66 App. Div., 216 (N. Y., 1901); Read v. St. Ambrose Ch., 137 Pa. St., 320 (1891); Harrisburg v. Hope Fire Co., 2 Pearson, 269, 272 (Pa., 1876); Henderson v. Ownby, 56 Tex., 647 (1882); Harper v. Harper, 20 N. Z., 317 (1900). Where a husband conducts his wife's mill without other compensation than a living, and annexes a boiler and an engine for furnishing motive power during low water, he can not remove the same. Albert v. Uhrich, 180 Pa. St., 283 (1897). A building was constructed by the Russian-American Company upon land belonging to Russia. *Held*, that, upon the cessation of Alaska to the United States, such building became the property of the United States. Kinkead v. United States, 150 U. S., 483 (1893). A grant was made of certain timber with the privilege of erecting a saw-mill and other necessary buildings. The grantor then conveyed the land excepting the timber, and the right to erect houses and mills for sawing timber, and "dwelling-houses." *Held*, that a dwelling-house and outhouses erected by the grantee of the timber were not removable by him, although the other structures were. Johnson v. Willinghby, 3 Tenn. Cas. (Shannon), 338 (1875). A partition fence, although built by one landowner, becomes a part of the realty, and can not be removed by him at pleasure. Smith v. Johnson, 76 Pa. St., 191, 196 (1874); Stoner v. Hunsicker, 47 Pa. St., 514, 515 (1864). The rule stated in the text applies where the annexations are made by the owner of a majority of the stock in a corporation, to a building owned by the corporation. Murray v. Bender, 125 Fed., 705, 711 (U. S. C. C. A., Mont., 1903). A house erected by a trespasser belongs to the landowner, and the latter is not guilty of malicious mischief in tearing it down. Malone v. State, 79 Tenn., 701 (1883). Where a landowner asked for a decree for removing from the ground one who had erected a house thereon in *mala fide*, the court observed that it might be a question how far the house or its materials were removable. Hamilton v. Johnston (1877), 14 Scot. Law Rep., 298, 299. Stone flags permanently laid by a village in a street, the abutting lot-owner's fee extending to the

middle of the street, belong to such landowner, and may not be removed by the village for non-payment of the assessment therefor. Platt v. Oneonta, 84 N. Y. Supp., 699 (1903). Where a village constructs a plank sidewalk by the side of a lot, the village authorities have no right to remove it without the consent of the lot-owner, no matter in whom the fee in the street resides; and, if removed, the lot-owner is entitled to recover in trespass to the extent of his injury, not exceeding the value of the lot, the removal not appearing to have been done with bad motives. Rogers v. Randall, 29 Mich., 41 (1874). In Meriam v. Brown, 128 Mass., 391, 393 (1880), and Hunt v. Missouri P. R'y Co., 76 Mo., 115 (1882), the rule stated in the text was applied to structures erected by a railroad company; and in Chicago Dock & Canal Co. v. Garrity, 115 Ill., 155, 171 (1885), it was *held* that a railway track built by private means upon a street the fee of which is in the city, for the express purpose of directly benefiting the builder, was not within the private control of such builder; but in Illinois Cent. R. R. Co. v. Hoskins, 80 Miss., 730, 738 (1902), it was *held* that a track laid by a railroad company as a trespasser, is removable by it, as such track is laid for public use, and the company acquires a mere easement; and no distinction is to be made between a main line and a spur-track to reach a gravel pit.] A house built by a society upon the land of another, under the circumstances stated in the text above, but with an understanding that the land should be held for them, and an evident expectation that it would after a while be conveyed to them, becomes part of the realty; and the owner of the land has an insurable interest in such house, which is not forfeited by his consent revoked before the sale, that the house should be sold as personal property on an execution against the society. Oakman v. Dorchester Ins. Co., 98 Mass., 57 (1867). [An insurance company can not recover from a railroad company for any amount paid by the former to the builder of a house upon the railroad company's land, such house having been built without authority and set on fire by one of its locomotives. The property in the house vested in the railroad company, and as the builder had no right to recover, the insurance company could not, as it could only be subrogated to the rights of the builder. Prescott & A. C. R'y Co. v. Rees, 3 Ariz., 317 (1892).] The rule above stated is also in some cases applicable to the assessment of damages in proceedings for the condemnation of land for public purposes: thus, where a railroad company, being already in the occupation of land with its track, took proceedings to acquire the title, it was *held*, that if the company was a trespasser in laying its track, any fixtures placed thereon while its occupation was as a trespasser, belonged to the owner of the land, and that the railway track composed of rails, ties, etc., was a fixture, and its value as such enhancing the value of the land for the beneficial enjoyment thereof, was the measure of compensation. Van Size v. Long Island R. R. Co., 3 Hun, 613 (1875); Matter of Long Island R. R. Co., 6 N. Y. Supr. Ct. R., 298 (1875). The same point was decided in Graham v. Connersville, etc., R. R. Co., 36 Ind., 463 (1871); s. c., 10 Am. Rep., 56, with reference to a railroad depot and other buildings; [likewise as to

stone piers. Pennsylvania, P. & B. R. Co. v. Trimmer, 31 Atl., 310, 312 (N. J. Ch., 1895)]; and in United States v. Land in Monterey Co., 47 Cal., 515 (1874), with reference to a stone lighthouse. [In proceedings to condemn land for a life saving station, a remainderman is not entitled to compensation for a building which had been erected by the United States upon the land in the lifetime of the life tenant, and which was removable as against such life tenant. United States v. Smith, 110 Fed., 338 (U. S. Dist. Ct., N. Y., 1901); likewise as a bridge where the landowner permitted the erection pending the adjustment of damages. Sullivan v. Lafayette County, 58 Miss., 790, 802 (1881); and as to a schoolhouse built in good faith by the school board. Searl v. School Dist., 133 U. S., 553 (1890); see, also, Burns v. School Dist., 61 Neb., 351 (1901), as to a schoolhouse not being covered by a mortgage on the land.] But where a railroad company, under proceedings for condemnation, enters upon the land under an order of court for that purpose, and constructs its track (which is imbedded in the soil) across the land, and the proceedings are subsequently dismissed, and new proceedings commenced for the condemnation of the land against the vendee of the original owner of the land, the owner is not entitled to have the value of the iron and ties constituting the track included in his damages upon the final condemnation, the possession of the company when the track was laid being rightful. California Pacific R. R. Co. v. Armstrong, 46 Cal., 85 (1873); s. c., 1 Cent. Law Jour., 452. In Louisiana, it is held that a railway is not an immovable, either by nature or destination, if the soil over which it is laid belongs to another, and that the rails in such case do not become immovable by being laid down. State v. Gulf R'y Co., 3 Rob., 513 (1843). [Where a railroad company, placing structures upon land of another, was not a trespasser, the courts have quite uniformly held that, in subsequent condemnation proceedings, the company should not be required to pay for such improvements as a part of the land; and a company is not a trespasser where, acting in good faith, it has obtained the consent of the party in possession of the land, although such party was a mortgagor, a life tenant, or holding adversely, or where such structures have been made by mistake. San Francisco & N. P. R. R. Co. v. Taylor, 86 Cal., 246, 248 (1890); California S. R. R. Co. v. Southern Pacific R. R. Co., 67 Cal., 59, 62 (1885); Charleston R'y Co. v. Hughes, 105 Ga., 1, 25 (1898); Calumet Riv. R'y Co. v. Brown, 136 Ill., 322, 334 (1891); Ellis v. Rock Island & M. C. R. R. Co., 125 Ill., 82 (1888); Emerson v. Western Union R. R. Co., 75 Ill., 176, 178 (1875); Skinner v. Ft. Wayne, T. H. & S. W. R. R. Co., 99 Fed., 465 (U. S. C. C., Ind., 1900); St. Louis, K. & S. W. R. R. Co. v. Nyce, 61 Kan., 394 (1900), overruling Briggs v. Chicago, &c., R. R. Co., 56 Kan., 526 (1896); Ritchie v. Kansas, N. & D. R'y Co., 55 Kan., 36, 59 (1895); Cohen v. St. Louis, F. S. & W. R. R. Co., 34 Kan., 158 (1885); Morgan's App., 39 Mich., 675 (1878); Mississippi & T. R. R. Co. v. Devaney, 42 Miss., 555, 602 (1869); North Hudson R. Co. v. Booraem, 28 N. J. Eq., 450 (1877), overruling Booraem v. Wood, 27 N. J. Eq., 371 (1877); Oregon R. & N. Co. v. Mosier, 14 Ore., 519 (1887); St. Johnsbury &

L. C. R. R. Co. v. Willard, 61 Vt., 134 (1888); Aspinwall v. Chicago & N. W. R'y Co., 41 Wis., 474, 477 (1877); see, also, VanHusen v. Omaha, B. & T. R'y Co., 118 Iowa, 366, 380 (1902); Atchison, T. & S. F. R. R. Co. v. Morgan, 42 Kan., 23, 30 (1889); Dows v. Congdon, 16 How. Pr., 571 (N. Y., 1858); Kennedy v. Milwaukee & St. P. R'y Co., 22 Wis., 581 (1868); but it was held in Philadelphia, R. & N. E. R. R. Co. v. Bowman, 23 App. Div., 170 (1897), aff'd in 163 N. Y., 572 (1900), that where a railroad company purchases land subject to a mortgage, and lays track thereon, upon foreclosure of such mortgage, the company being a party to the suit and not asserting any right, the purchaser at the foreclosure sale acquires all of the improvements. Where a railway company has taken copyhold lands and made improvement thereon, a subsequent assessment of the compensation to be paid to the lord of the manor, should have no regard to the improved value of the land. Lowther v. Caledonian R'y Co. [1892], 1 Ch., 73, reversing [1891] 3 Ch., 443. In California a distinction is still made between improvements made by a railroad company in good faith and those made by a company which is a trespasser; though a company is only considered a trespasser where it enters upon land not intending to condemn it. Albion Riv. R. R. Co. v. Hesser, 84 Cal., 435, 440 (1890); but in most states no distinction is now made in such cases, the maxim, *quicquid plantatur solo, solo cedit,* being held to have no just application, as the structures were dedicated, not to the use and enjoyment of the freehold, but to public uses. The improvements would be inconvenient to the landowner so long as they remained unsevered, and valuable to him only as personal property. Another distinction between the company and an ordinary trespasser is that the latter has no remedy by which he may acquire the use and enjoyment of or title to lands against the will of the owner, and the application of the strict common law rule in the case of railroad companies might result in encouragement by the landowner of delay in compelling compensation. Jones v. New Orleans & S. R. R. Co., 70 Ala., 227, 231 (1881); Newgass v. Railway Co., 54 Ark., 140, 146 (1891); Jacksonville, T. & K. W. R'y Co. v. Adams, 28 Fla., 631 (1891); Chicago & Alton R. R. Co. v. Goodwin, 111 Ill., 273, 282 (1884); Daniels v. C., I. & N. R. Co., 41 Iowa, 52 (1875); Toledo, A. A. & G. T. R. R. Co. v. Dunlap, 47 Mich., 456, 465 (1882); Greve v. First Div. St. P. & P. R. R. Co., 26 Minn., 66 (1879); Louisville, N. O. & T. R. R. Co. v. Dickson, 63 Miss., 380, 385 (1885); Preston v. Sabine, &c., R'y Co., 70 Tex., 375 (1888); Texas & P. R'y Co. v. Hays, 3 Tex. Ct. App., Civ. Cas., § 56 (1885); Seattle & M. R. R. Co. v. Corbett, 22 Wash., 189 (1900); Bellingham, B. & B. C. R. R. Co. v. Strand, 14 Wash., 144, 151 (1896); Lyon v. Green Bay & M. R'y Co., 42 Wis., 538, 545 (1877); see, also, Mitchell v. Ill. & St. Louis R. R. & Coal Co., 85 Ill., 566 (1877); Lake Whatcom Logging Co. v. Callvert, 73 Pac., 1128, 1130 (Wash., 1903). In Hendy v. Trinty & S. R. Co., 24 Am. & Eng. R. R. Cas., 286, 287 (Tex., 1886), a distinction is made between improvements which can not be used by the landowner in connection with his land, such as railroad track, and those which the landowner can use without disturbing them, such as build-

ings; and, in condemnation proceedings, damages should be allowed for the latter. Railroad track laid without authority does not pass under recovery in ejectment. Justice v. Nesquehoning R. R. Co., 87 Pa. St., 28 (1878). Where a railroad is constructed across a farm without right, and the owner brings an action for the trespass, the value of the ties and rails, though they are a part of the realty, should not be deducted from the injury done to the farm unless they enhanced its value. Schroeder v. DeGraff, 28 Minn., 299, 300 (1881).] See, also, Pennybacker v. McDougal, 48 Cal., 160 (1874), where it was held that a small frame building called a cabin, erected upon the land of the United States, by being set upon blocks resting upon the surface of the ground and not attached thereto, but removable without disturbing the soil, is personal property, not passing with the land, but removable by the builder upon his leaving the land after its sale by the United States. It was also intimated in the same case, that the same rule applied to a portable fence composed of parts of boards, resting wholly on the surface, and in no manner annexed to the freehold. These two cases are believed to be opposed to the weight of modern authority, and to be unsound in principle. [In McKiernan v. Hesse, 51 Cal., 594, 596 (1877), a saw-mill was *held*, as between a grantee of the land from one who receives a patent from the United States, and a former tenant of one in possession before the land was pre-empted, to be a structure affixed to the freehold under the statute. The sills of the mill were imbedded in the soil. Two boilers, sixteen feet long, without the framework of the mill, were secured by trestle-work of stone and mortar resting upon the earth. An engine, also outside the framework of the mill, rested upon a long timber to which it was attached by bolts, and this timber was notched into the upper surface of sills which were imbedded in the ground. The shafting and attachments of this machinery were fastened by bolts of iron to the framework of the mill.] In Wickliffe v. Clay, 1 Dana, 585, 591 (1833) (in chancery on cross appeals), it is said: "There is no reason to doubt that Lythe took possession of the lot, not as a willful trespasser, but in good faith (not knowing or apprehending that it was the property of Phillips and wife) and that while thus possessed, he erected the stable in equal good faith; and therefore he, or any other person claiming under him, had a perfect right, according to the doctrines of the civil law, altogether consistent in this respect with the principles of the common law, to remove the stable, without doing any injury to the lot itself whilst he was in possession; and consequently by such a removal no liability was incurred to the true owners of the lot." This case was, however, disproved in Stillman v. Hamer, 8 Miss., 424 (1843). [See Sheffield v. Griffin, 21 Kan., 417, 419 (1879), where a trespasser upon Government land sells his improvements, and afterwards acquires title to the land.]

[The rule stated in the text does not apply to leaseholds. Thus, where a lessor claiming that a lease had expired, demises to another, and the latter places fixtures upon the land, he can remove his fixtures if the former lease is adjudged valid. Linden Oil Co. v. Jennings, 207 Pa. St., 524, 526 (1904). See, *post*, p. *441, as to fixtures passing by virtue of recovery in ejectment.]

joint owners as to strangers; one joint tenant or tenant in common cannot erect buildings or make improvements on the common property without the consent of the rest, and then [*59] *claim to hold till reimbursed a proportion of the money expended. Nor can he authorize it to be done by a third person. Nor will it make any difference that the co-tenants knew that the building was being erected, and made no objection.[1] It makes no difference that an annexation was made by mistake, if made thereon without the consent of the owner of the land.[2] The same rule is also applied to cases where the owner

[1] Crest v. Jack, 3 Watts, 238 (1834); Baldwin v. Breed, 16 Conn., 60 (1843). In Baldwin v. Breed, H. and W. being tenants in common of land, W., with the consent of H., erected, at his sole expense, a store upon the premises, permanently annexed to the freehold; in an action for partition, it was alleged that plaintiff and defendant were tenants in common, in equal moieties of the land, and that plaintiff was sole owner of the store; *held*, that in the absence of any agreement that the store should belong to W., or that he might remove it, it could not be treated as W.'s separate property, and that the consent of H. to its erection did not authorize the inference that either party contemplated that it should be the separate property of W., or that W. might remove it. [See Reed v. Reed, 68 Me., 568, 570 (1878).]

[Where three parties erected a brick factory upon land owned by two of them, this does not make the undivided interest of one of them in the factory subject to levy as personal property. Allen v. Scott, 38 Mass., 25 (1838).]

[2] Blair v. Worley, 1 Scam., 178 (1835); Seymour v. Watson, 5 Blackf., 555 (1841); Burleson v. Teeple, 2 G. Greene, 542 (1850); holding that a rail fence built upon land of the U. S. by mistake passes by a subsequent sale of the land to a third person. [Hereford v. Pusch, 68 Pac., 547, 550 (Ariz., 1902); Dutton v. Ensley, 21 Ind. App., 46, 50 (1898); Kimball v. Adams, 52 Wis., 554, 556 (1881); Masefield v. Rotana, 10 N. Z., 169, 172 (1891).] See, also, Climer v. Wallace, 28 Mo., 556 (1859). [Graham v. Roark, 23 Ark., 19, 23 (1861); Brandser v. Mjageto, 79 Minn., 457, 459 (1900); Rotan Grocery Co. v. Dowlin, 77 S. W., 430 (Tex. Civ. App., 1903).] See, however, Pennybacker v. McDougal, 48 Cal., 160 (1874). [Bingham Ass'n v. Rogers, 7 Ida., 63 (1900); Darnall v. Jones, 24 Ky. Law R., 2091 (1903).] The rule on this subject in Missouri seems to be understood to be different. In Lowenberg v. Bernd, 47 Mo., 297 (1871), the controversy arose from a disputed boundary line, each party claiming that the house in question was situated upon his own land. Bliss, J.: "Purchasers of adjoining land are divided by what each considers the true line of division. One of them with the knowledge of, and without objection from, the other, builds a house, and subsequent purchasers recog-

nize the same line. A survey, however, so changes this line as to throw the house upon the adjoining land, whereupon its owner moves it back within the last line. His neighbor, who had hitherto supposed the house belonged to its purchaser and occupant, and whose vendor had consented to its being built, commences suit for trespass. I care not whether the declarations in relation to the division line were technically correct or not. Admitting all that the plaintiff claims, there was a license to build the house by the then owner of the land upon which it is claimed to have been built. It was recognized as the property of the builder and his assigns down to the running of the new line, and as soon as the license could be considered as withdrawn the owner removed the building, as he had a right to do. When one builds a house or fence, or places any other erection upon the land of another with his permission, with the intention that it be held as the property of the builder, it continues personal property, and the owner may remove it when the license is withdrawn. Hines v. Ament, 43 Mo., 298; Matson v. Calhoun, 44 Mo., 368; 1 Washb., 5. The Circuit Court rendered judgment for defendant, and the judgment of the District Court, reversing it, is reversed. The other judges concur.'' The same rule was applied in Matson v. Calhoun, 44 Mo., 368 (1869), to the case of a rail fence, though the fact of license and permission being left to the jury and found by them in that case, it may be thereby distinguished. See, also, Hines v. Ament (*supra*). While the rule as above declared is so entirely just and equitable as to deserve legislative approval by way of amendment to the common law, it is nevertheless believed not to be in accordance with the rule as generally understood and applied. The fundamental error of the case seems to be in an assumption of the premises, which being granted the conclusion is correct. The opinion states, that ''one of them with the knowledge of, and without objection from, the other, builds a house'' upon what both supposed to be the land of the builder. No reason is perceived why any one should object to his neighbor's building on what both supposed to be his own land; and the supposed license, if any there was, was likewise that his neighbor might build upon what both supposed to be his neighbor's own land, which, if it can be considered as in any sense a license, was based upon such a mistake of fact as to render it of no validity. The case is one that should be made the subject of statutory amendment, and until this is done it is believed that the rule is as stated in the text. The act of Feb. 23, 1819 (R. L., 419; Gale's Stat. Ill., 433), entitled ''an act to enable persons to remove fences made by mistake on the lands of other persons,'' applies only to natural persons, and has no relation to the case of a fence erected upon land of the United States. Blair v. Worley (*supra*). All improvements on public lands of the United States, which have become a part of the realty, pass to the purchaser thereof from the United States; and the Act of March 30, 1868 (Stats. 1867-8, p. 708), providing that an inhabitant of the State who has put improvements upon any land of the United States or of the State, or who has the right of possession of such improvements, may remove the same within six months after the land shall have become the private property of any person; and declaring that houses, barns, sheds, outhouses, buildings, fences, orchards

[*60] *of the land is under a legal disability, and hence cannot legally consent to the erection of a building or other structure [*61] upon the *land;[1] *e. g.*, erections by the father upon the land of his minor child.[2] But with reference to the disability of coverture, although the wife, by reason of her general disabilities arising from the marriage, is not competent to restrict or enlarge the husband's rights over her property, or to contract with him in reference to it, and cannot therefore consent to his erecting buildings or making improvements upon her property, yet as he is in his own right a tenant by marital right of her lands during their joint lives, he must be regarded as making improvements as a tenant for life in his own right, irrespective of any contract with his wife;[3] and therefore, where the annexa-

and vineyards, shall be held to be improvements within the meaning of the act, in so far as it relates to improvements which are part of the realty, is void, as interfering with the primary disposal of the public lands by the United States, and in violation of the act admitting California into the Union. Collins v. Bartlett, 44 Cal., 371 (1872); Pennybacker v. McDougal, 48 Cal., 160 (1874). In general, however, in this State where pre-emption claims to public mineral lands are for most purposes regarded as titles, as legal estates of freehold, the ordinary rules of the law of fixtures apply to erections thereon. Merritt v. Judd, 14 Cal., 59 (1859). [Merritt v. Judd, *supra*, was followed in Roseville Min. Co. v. Iowa Gulch Co., 15 Colo., 29 (1890).]

[1] Washburn v. Sproat, 16 Mass., 449 (1820); Marable v. Jordan, 5 Humph., 417 (1844); Howard v. Fessenden, 14 Allen, 128 (1867). [See Haggerty v. McCanna, 25 N. J. Eq., 48 (1874).]

[An agreement that a building to be placed by a father upon the land of a married daughter, may be removed by him, is void; and a similar agreement, after the building has been erected and the disability removed, would be concerning her own property, and without consideration, and void. *Re* Perkins' Est., 26 Atl., 637, 638 (Vt., 1893).]

[2] Copley v. O'Neil, 1 Lans., 214 (1869), holding such a building not subject to a mechanic's lien as the property of the father. Mathes v. Dobschutz [72 Ill., 438], Supr. Ct., Ill., Oct., 1874; 7 Chicago Leg. News, 43. [In Adams v. Kauwa, 6 Hawaii, 280 (1881), a guardian was allowed, after the death of his ward (son), to remove a house erected by him upon his ward's land, as he is not a trespasser. The manner of annexation is not clearly shown in the opinion, but it seems to have been slight.]

[3] Doak v. Wiswell, 38 Me., 569 (1854); Estate of Hinds, 5 Whart., 138 (1840). See, also, Washburn v. Sproat, 16 Mass., 449 (1820). [Adams v. Kauwa, 6 Hawaii, 280 (1881); White v. Hildreth, 32 Vt., 265 (1859). The rule has been changed by statute in Maine. See Peaks v. Hutchinson, 96 Me., 530 (1902).]

tion comes within the rule as to trade fixtures, existing between the representatives of the tenant for life and the remainderman, it may be removed by his personal representatives.[4]

There has been made, however (and very properly, as it *seems), a distinction as regards the persons between whom [*62] the question arises; and it has accordingly been held that a building erected by an individual, on piles driven into the bed of a navigable river below water mark, the interest of the soil belonging to the public, and the builder having no right thereto, is as between individuals personal property.[5] The rule, it will

[4] Estate of Hinds (*supra*). See the subject further considered in its proper place, *post*.

[5] Marcy v. Darling, 8 Pick., 283 (1820). See, also, Lancaster v. Eve, 5 C. B. (N. S.), 717 (1859); Fuller v. Tabor, 39 Me., 519 (1855); Foy v. Reddick, 31 Ind., 414 (1869), where the house stood in the street. [See Michigan Mut. Ins. Co. v. Cronk, 93 Mich., 49, 51 (1892); Taylor v. Prendergast, 29 S. W., 87, 88 (Tex., 1894); Page v. Urick, 31 Wash., 601, 604 (1903); Paige v. Peters, 70 Wis., 178 (1887); Dixon v. Mackay, 38 Can. Law J., 653 (Man., 1902).]

[Buildings erected by a firm upon public lands are chattels real, and partnership assets. Tarabino v. Nicoli, 5 Colo. App., 545, 552 (1895). Dwelling-houses, fences, grapevines, etc., upon public lands, are, between private parties, personal property. See Mantooth v. Burke, 35 Ark., 540, 545 (1880); O'Hanlon v. Denvir, 81 Cal., 60 (1889). This question is regulated by statute in Nebraska. See Paxton Cattle Co. v. First Nat. Bank, 21 Neb., 621, 646 (1887); Carkins v. Anderson, 21 Neb., 364 (1887); Brooks v. Hiatt, 13 Neb., 503 (1882); McWilliams v. Bridges, 7 Neb., 419, 422 (1878). Improvements upon government land are consideration for a promissory note. Bell v. Parks, 18 Kan., 152 (1877); but see Merrell v. Legrand, 2 Miss., 150 (1834), where it was *held* that a promissory note given for improvements made upon government land by a trespasser, is for an illegal consideration, and not recoverable.]

[Where the contest is between parties who do not own the land, the question does not arise as to whether fixtures could be removed by one of the parties as against the landowner. Greenebaum v. Taylor, 102 Cal., 624, 626 (1894); see Sawyer v. Long, 86 Me., 541 (1894), as between a chattel mortgagee and a buyer of fixtures; March v. McKoy, 56 Cal., 85, 86 (1880), as between the "lessor" of an engine and boiler and a purchaser thereof; and Myrick v. Bill, 3 Dak., 284, 288 (1883), where a bill of sale was given by a party in possession of a dwelling-house and store upon railroad lands.]

[The fact that a platform and a "lean-to" connected with a mill, stand upon the land of an adjoining owner, does not justify a party in refusing to carry out his contract to buy the mill, where it does not appear that the

be observed, proceeds upon the presumption of an intended gift to the owner of the soil.[6] This presumption as to the intention of the party making the annexation, is not, however, in all cases a conclusive one, and may be rebutted by circumstances showing a contrary intention. It is not a necessary inference from the simple fact of annexation, where the chattel is severable without injury to itself or the freehold, that the chattel becomes the property of the freeholder; but it is always open to inquiry how the article came to be in the place in which it is found, and what the parties intended as to its use, and the jury may infer from user or other circumstances, an agreement when the chattel was annexed that the original owner should have liberty

adjoining landowner claims any interest in the platform or the "lean-to." Towner v. Tucknor, 112 Ill., 217, 223 (1885).]

In California, where preemption claims to public mineral lands are for most purposes regarded as titles, or legal estates of freehold, the ordinary doctrines of the law of fixtures apply to erections thereon. Merritt v. Judd, 14 Cal., 59 (1859).

[6] *Prima facie* a building is real estate, and belongs to the owner of the land on which it stands, and such is the presumption, even where a building is erected by one man upon the land of another. Chatterton v. Saul, 16 Ill., 149 (1854). See the cases cited, *post*, ch. 3 [p. *66. Matzon v. Griffin, 78 Ill., 477, 480 (1875); Sullivan v. Carberry, 67 Me., 531, 532 (1877); Missouri Pac. R'y Co. v. Cullers, 81 Tex., 382, 390 (1891); Northrup v. Trask, 39 Wis., 515, 518 (1876); see, also, Tharp v. Allen, 46 Mich., 389, 392 (1881). For presumption as between landlord and tenant, see *post*, p. *134].

[That buildings are designated as a "camp" does not prove that they are no part of the land. Missouri Pac. R'y Co. v. Cullers, 81 Tex., 382, 390 (1891).]

[In order to show that a building is a chattel, it is not sufficient to prove that it rested upon stone pillars, but it must be shown that it rested upon the pillars solely by its own weight, without being connected with the soil by any means. McKenzie v. McDonald, 2 Nova S. Dec., 11, 12 (1869).]

[Where there is nothing to show how a saw-mill and a grist-mill are attached to the realty, or who owns the land, perhaps no presumption would arise as to whether they are realty or personalty. Price v. Malott, 85 Ind., 266, 269 (1882).]

[The fact that a firm may have paid some of the bills incurred in completing buildings used by them upon land belonging to one partner, is not inconsistent with sole ownership of the building by that one partner where he advanced money to the firm; and at most the firm would only have a lien for compensation. Goepper v. Kinsinger, 39 Ohio St., 429 (1883).]

to take it away again.[7] Thus, in Lancaster v. Eve,[8] where the plaintiffs were possessed of a wharf on the Thames, in front of which about twenty years before, a pile of wood had been driven into the bed of the river *by the plaintiffs' predecessors, [*63] occupiers of the wharf, and had remained there without interruption from the crown or conservators of the river, and was necessary to the enjoyment of the wharf, it was held, that these were circumstances from which the court could properly draw the inference that the pile was not so placed with a view to its permanent annexation to the freehold so as to become a part thereof, but that it was placed there by virtue of an easement granted by the crown, or whoever had a right to grant it, and that there was a sufficient possession in plaintiffs to entitle them to maintain an action against defendants for negligently running against it or removing it. Williams, J., observed: "No doubt the maxim *'Quicquid plantatur solo, solo cedit,'* is well established, the only question is, what is meant by it. It is clear that the mere putting a chattel into the soil by another cannot alter the ownership of the chattel. To apply the maxim, there must be such a fixing of the soil as reasonably to lead to the in-

[7] Mant v. Collins (1841), cited in Wood v. Hewitt, 8 Q. B., 916, 919 (1846); s. c., 15 L. J. Q. B., 247; 10 Jur., 390. In Wood v. Hewitt, the article in question was a fender moving up and down in a groove fixed to brickwork, and when down resting upon a sill fixed in brick, used to prevent the escape of water in a mill stream. In Mant v. Collins, it was the door of a pew in a church, hung on hinges and removable without interfering with the staple. See, however, Ogden v. Stock, cited in § 4, ch. 1. [That right of removal may be implied from circumstances, see Price v. Malott, 85 Ind., 266, 269 (1882); and Fischer v. Johnson, 106 Iowa, 181, 184 (1898), the former case relating to a grist-mill and saw-mill, and the latter to corn-cribs.]

[The rule that when a person affixes his property to the land of another without agreement, the thing affixed belongs to the owner of the land, does not apply to improvements upon government land, when removal thereof can be made without injury to the soil, as the laws of congress require adverse settlers to reside upon and improve lands before acquiring title; and to hold that such improvements are made for the use and benefit of the successful litigant would be a hardship upon the losing party which the law does not contemplate. Winans v. Beidler, 6 Okla., 603, 606 (1898).]

[8] 5 C. B. (N. S.), 717 (1859); s. c., 28 L. J., C. P., 235; 5 Jur. (N. S.), 683.

ference that it was intended to be incorporated with the soil."[1]

The question may, it is presumed, also be determined by the influence of a custom showing the intention of the parties.[2]

[1] See, also, Meigs' Appeal, 62 Penn. St., 28 (1869). The facts of this case were, that during the late rebellion, the United States erected with their own materials, buildings for military barracks and hospitals, on posts set in the ground on the public common of York, which had been granted "to be kept as an open common forever, for the use of said borough, and to and for no other use, intent, or purpose whatsoever;" and the borough authorities therefore had no authority to assent to the erections as permanent. After the war the officers of the government offered the buildings for sale, the buildings to be removed; and on these facts it was *held*, that the question of fixture or not, depends on the nature or character of the act by which the structure is put in place, the policy of the law connected with its purpose, and the intentions of those concerned in the act; that it not being the intention of either party that the buildings should be permanent, the character of the erections not being that of improvements for objects connected with the soil, and the act being distinguishable from an ordinary trespass, and the borough lying by and suffering the United States to put up the structures without objection on the public common, where, if permanent, they would be nuisances, the borough was estopped from declaring that the United States intended to annex their chattels to the freehold, and that the removal thereof would not be restrained by injunction. [See Potter v. Rend, 201 Pa. St., 318, 326 (1902); Wake v. Hall (1883), 8 App. Cas., 195, aff'g (1880) 7 Q. B. D., 295.]

[Where a railroad company, for the purpose of supplying its locomotives with water, dug a well and placed a boiler and pump upon land which it erroneously supposed was its own, and used the same for six years, this was not with the intention of ultimately improving the realty, and the boiler and engine might be removed. The boiler was placed upon a cast-iron base, but not set in masonry, and the pump was connected therewith by pipes. Atchison, T. & S. F. R. R. Co. v. Morgan, 42 Kan., 23, 31 (1889).]

[Where, in clearing unimproved land, one landowner, not knowing the exact division line, builds a temporary rail fence, which is partly upon the adjoining lot, he does not forfeit his property in the rails constituting such fence. Curtis v. Leasia, 78 Mich., 480, 484 (1889).]

[The owner of lot one built a cottage which, by mistake, was placed partly upon lots seventeen, eighteen, and the alley back of lot one. The house stood upon blocks of wood placed under the corners. The builder always treated it as personal property. The vendee of lot eighteen moved it to the center of his lot, placed brick piers under it and built an addition to it, and sold it and the lot. *Held*, that it remained the personal property of the builder. McDaniel v. Lipp, 41 Neb., 713, 716 (1894).]

[2] See the subject of custom considered *post*, Landlord and Tenant. See, also, Com. Dig., London, N. 5; Priv. Lond., 59. [Wake v. Hall (1883), 8 App. Cas., 195, aff'g (1880) 7 Q. B. D., 295.]

*The rule that annexations made by a stranger to the [*64] soil of another without his consent becomes the property of the owner of the soil, applies also to trees, plants, and crops planted or sowed thereon without the consent of the owner of the land.[3]

[3] Mitchell v. Billingsley, 17 Ala., 391 (1850); Simpkins v. Rogers, 15 Ill., 397 (1854); Boyer v. Williams, 5 Mo., 335 (1838); Masters v. Pollie, 2 Rolle, 141 (1620); Mo., 24, pl. 84; 1 Rolle, 101; Jenk., 204; Dyer, 31 b, pl., 219. See (*post*) Emblements. [Floyd v. Ricks, 14 Ark., 286 (1853); Castleberry v. Atlanta, 74 Ga., 164, 170 (1884); Mt. Carmel v. Shaw, 155 Ill., 37, 43 (1895), reversing 52 Ill. App., 429 (1893); Baker v. Normal, 81 Ill., 108 (1876); Krug v. Davis, 101 Ind., 75, 76 (1884); Kiernan v. Heaton, 69 Iowa, 136 (1886); Freeman v. McLennan, 26 Kan., 151 (1881); State v. Salisberry, 49 Kan., 160 (1892); Wadge v. Kittleson, 97 N. W., 856, 859 (N. Dak., 1903); see, also, Graham v. Roark, 23 Ark., 19, 23 (1861); Mercil v. Broulette, 66 Minn., 416, 418 (1896); and Ejectment, *post*, p. *442.]

[As between two parties, neither of whom claims title to the land, the title to a growing crop thereon depends upon the question as to which is in possession of the land. West v. Smith, 52 Cal., 322, 324 (1877).]

In Waterman v. Soper, 1 Ld. Raym., 737 (1697-8), it was ruled by Lord Holt at the Lent assizes at Winchester, upon a trial at *nisi prius*, that if A. plants a tree upon the extremest limits of his land, and the tree growing extends its roots into the land of B., next adjoining, A. and B. are tenants in common of this tree; but if all the root grows into the land of A., though the boughs overshadow the land of B. yet the branches follow the root, and the property of the whole is in A. The same rule was also laid down in an anonymous case in 2 Roll., 225. In Griffin v. Bixby, 12 N. H., 454 (1841), it was held that a forest tree standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both, and that trespass lies if one cuts and destroys it without the consent of the other. [Quillen v. Betts, 1 Pennewill, 53, 59 (Del., 1897); Nixon v. Stillwell, 5 N. Y. Supp., 248, 249 (1889); Miller v. Holland, 13 Pa. Co., 622 (1890). Also, one land-owner can be enjoined by the other from doing a serious injury to such trees. Musch v. Burkhart, 83 Iowa, 301 (1891). And an injunction will issue to restrain cutting down a tree, one-third of the trunk being upon the adjoining lot. Comfort v. Everhardt, 35 W. N. C., 364 (Phila., 1894). A line hedge is common property. Harndon v. Stultz, 100 N. W., 329 (Iowa, 1904).] See the rule of the civil law in Just. Inst., 2, 1, 31; Dig., 41, 1, 7, 13. See, also, Code Nap. Art., 670-673. In Masters v. Pollie (*supra*), however, in *trespass quare clausum fregit et asportavit* of boards, the defendant justified that there was a large tree which grew between the close of the plaintiff and defendant; that part of the roots of the tree extended into the defendant's close; that the tree was nourished by the soil, and that the plaintiff cut down the tree and carried it away into his own close, and

there sawed it into boards; whereupon the defendant entered and carried away some of the boards, etc.; and upon demurrer, the plea was held bad, for it matters not that some of the roots of the tree are in the soil of the defendant when the body or main part of the tree is in the soil of the plaintiff, for to this the rest of the tree appertains. In Holder v. Coates, 1 Moo. & M., 112 (1827), where the trunk stood in the defendant's land, but some of the lateral roots grew into the land of both parties, Littledale, J., said he thought the doctrine of Masters v. Pollie preferable to that of Waterman v. Soper, but in summing up, laid down the rule that the safest criterion was to consider the property in the tree as belonging to the owner of the land in which the tree was first sown or planted. In Lyman v. Hale, 11 Conn., 177 (1836), where the trunk of a forest tree was a little more than four feet from the line, but some of the roots as well as the branches extended over the line, it was *held*, approving Masters v. Pollie (*supra*), that the adjoining proprietors were not joint owners or tenants in common of the tree, which with its overhanging branches and the fruit thereon belonged wholly to the owner of the land whereon it stood. See, also, Pop. 163; Skinner v. Wilder, 38 Vt., 115 (1865). [The roots of a large elm tree upon adjoining land helped to form the wall of a spring ten feet distant, and the top overhung the spring. The owner of the spring has no right to the tree, and can have no action against the owner of the tree for cutting it. Lucas v. Bishop, 83 Tenn., 165 (1885).] The case of Griffin v. Bixby, may be distinguished from the other cases cited in that, in this case the tree stood directly upon the line, which passed through it; and where the tree is thus situated, it may doubtless properly be considered, to some extent common property. But where the body or trunk of the tree is entirely on one side of the line, and only the roots and branches extend over the line upon the adjoining land, the weight of authority is that there is no ownership in common; and Waterman v. Soper, if it may properly be deemed an authority to the contrary, is probably overruled. See, also, Relyea v. Beaver, 34 Barb., 547 (1861), where, while the first point in Waterman v. Soper is disapproved, the opinion is expressed that "the portion [of the trunk] that grows on the land of each, must belong separately to him, and not partly to him and partly to his neighbor." This case was affirmed without passing on this point, in Dubois v. Beaver, 25 N. Y., 123 (1862). See, also, Hoffman v. Armstrong, 46 Barb., 337 (1866); s. c., 48 N. Y., 201; 3 Kent Com., 438, note.

[Where a tree stands upon the boundary line, each land-owner has an interest identical with the part upon his land, and a right to demand that the owner of the other portion shall so use his part as not unreasonably to injure the whole. However, each land-owner has a right to cut the branches and roots extending upon his land; but not any portion of the trunk. Divisions of the trunk extending more perpendicularly than horizontally, are to be regarded as a portion of it. One land-owner, wishing to build up to the line, will not be enjoined from removing that portion of the trunk upon his land, where such action would de-

*The legal effect of annexation of a chattel to the realty [*65] of another, with his consent, or under a contract, express or implied, will be considered in the next chapter. See, also, *post*, annexations to the freehold of the church.

prive him of an opportunity to build (the lot in this case being but twenty-one feet in width, and the tree a large one), as such action would be likely to produce a greater irreparable injury to him than a destruction of the tree would to the other land-owner, but the contestants should be left to settle their rights at law. Robinson v. Clapp, 65 Conn., 365 (1895); 67 Conn., 538 (1896).]

[Trees and their overhanging branches in so far as they are on or over the land of the adjoining land-owner, belong to him, and he can cut them off at his pleasure. Grandona v. Lovdal, 78 Cal., 611, 618 (1889).]

[The rule in regard to trees upon the boundary line between private land-owners does not apply where a tree is on the line between a public highway and an adjoining lot. In such case, if it is necessary to remove a part of the tree for the purpose of constructing a sidewalk, and the part left would be a menace to public travel, the entire tree may be removed. Wilson v. Simmons, 89 Me., 242, 262 (1896).]

CHAPTER III.

OF THE LEGAL EFFECT OF ANNEXATION OF CHATTELS TO THE SOIL OF ANOTHER WITH HIS CONSENT, OR UNDER A CONTRACT, EXPRESS OR IMPLIED, AS TO THEIR REMOVAL.[1]

The influence of the intention of the parties in determining whether or not by annexation to the realty, an article has lost its chattel nature and become a part of the realty, is well illustrated by the cases discussing the subjects of this chapter. *Prima facie,* all buildings, and especially dwelling houses, belong to the owner of the land on which they stand as part of the realty; and the burden of proof is upon those who claim that they are personal property to show that they retain that character.[2] And, perhaps, it may be said that, in the absence

[1] This chapter is not intended to include the discussion of questions arising out of the ordinary relations of landlord and tenant, vendor and vendee, etc., nor of questions arising between those parties, which are reserved for future chapters.

[2] See Howard v. Fessenden, 14 Allen, 128 (1867); Madigan v. McCarthy, 108 Mass., 307 (1871); Fisher v. Saffer, 1 E. D. Smith, 611 (1852); Smith v. Benson, 1 Hill, 176 (1841); Chatterton v. Saul, 16 Ill., 149 (1854); Dooley v. Crist., 25 Ill., 551, 556 (1861); Meyers v. Schemp, 67 Ill., 469 (1873); Goff v. O'Conner, 16 Ill., 421, 423 (1855); Curtiss v. Hoyt, 19 Conn., 165 (1848). [Harris v. Powers, 57 Ala., 139, 143 (1876); Pedroni v. Eppstein, 17 Colo. App., 424 (1902); Myrick v. Bill, 3 Dak., 284, 287 (1883); Booth v. Kapuakela, 10 Hawaii, 414, 415 (1896); Mathes v. Dobschuetz, 72 Ill., 438, 441 (1874); Indianapolis, D. & W. R'y Co. v. First Nat. Bank, 134 Ind., 127 (1892); Price v. Malott, 85 Ind., 266, 269 (1882); District Twp. of Corwin v. Moorehead, 43 Iowa, 466, 468 (1876); Merchants' Nat. Bank v. Stanton, 59 Minn., 532, 536 (1894); Agnew v. Jones, 74 Miss., 347, 352 (1896); Talbot v. Cruger, 151 N. Y., 117, 120 (1896), aff'g 88 Supr. Ct. (81 Hun.), 504, 508 (1894); Western N. C. R. R. v. Deal, 90 N. C., 110, 111 (1884); Histe v. Buckley, 8 Ohio C. C. R., 470, 473 (1894); Evans v. McLucas, 15 S. C., 67,

of circumstances showing a contrary intention, the same rule applies to all other actual annexations to the soil.[3] It is, however, well settled that, with the limitation stated below, the character of personal property, and the right of removal thereof as against the owner of the soil, may be preserved by an agreement previous to its annexation between the owner of the soil and the owner of the chattel, that the same shall be considered as per*sonal property removable by its owner, notwithstand- [*67] ing its annexation to the soil;[4] though if annexed wrongfully or

70 (1880); Bean v. Toland, 1 Tex. Ct. App., Civ., § 1022 (1881); see, also, Bonson v. Jones, 89 Iowa, 380, 387 (1893); Wheeler v. McFerron, 33 Ore., 22, 25 (1898).]

See, however, Rogers v. Woodbury, 15 Pick., 156 (1832), cited *post*, Remedies. [See, *post*, p. *134 for presumption as between landlord and tenant.]

[3] See Holland v. Hodgson, L. R., 7 C. P., 328, 334 (1872); Brown v. Bridges, 31 Iowa, 146 (1870); and cases cited *ante*, p. *32. [Powers v. Harris, 68 Ala., 409, 411 (1880); Ott v. Specht, 8 Houston, 61, 70 (Del., 1887); Rowand v. Anderson, 33 Kan., 264, 267 (1885); Shelton v. Willis, 23 Tex. Civ. App., 547, 550 (1900).]

[Saw-mills and grist-mills erected upon the land of another, being used in mercantile business, are presumed to be personalty. Price v. Malott, 85 Ind., 266, 269 (1882).]

[A fence is not, out and out, a part of the land. Ivins v. Ackerson, 38 N. J. Law, 220, 222 (1876).]

[4] Howard v. Fessenden, 14 Allen, 124, 128 (1867); First Parish of Sudbury v. Jones, 8 Cush., 184, 190 (1851); Curtis v. Riddle, 7 Allen, 187 (1863); Doty v. Gorham, 5 Pick., 487 (1827); Wells v. Banister, 4 Mass., 514 (1808); Taft v. Stetson, 117 Mass., 471 (1875); Hartwell v. Kelly, 117 Mass., 237 (1875); Feimster v. Johnson, 64 N. C., 259 (1870); Aldrich v. Parsons, 6. N. H., 555 (1834); Harris v. Gillingham, 6 N. H., 9 (1832); Coleman v. Lewis, 27 Pa. St., 291 (1856); Hunt v. Bay State Iron Co., 97 Mass, 279 (1867); Smith v. Benson, 1 Hill, 176 (1841); Alexander v. Touhy, 13 Kan., 64 (1874), also holding that where the lease provided that the tenant might remove the buildings at the expiration of his term, such provision could not be construed as prohibiting their removal during the continuance of the term; Dame v. Dame, 38 N. H., 429 (1859); Ham v. Kendall, 111 Mass., 297 (1873); Goodman v. Hannibal & St. Jo. R. R. Co., 45 Mo., 33 (1869); Curtiss v. Hoyt, 19 Conn., 165 (1848); Osgood v. Howard, 6 Me., 452 (1830); Jewett v. Patridge, 12 Me., 243 (1835). See, however, Ford v. Cobb, 20 N. Y., 344, 350 (1859), per Denio, J.; Tifft v. Horton, 52 N. Y., 377, 380 (1873), cited *post*, in this chapter. [Powers v. Harris, 68 Ala., 409, 411 (1880); Harris v. Powers, 57 Ala., 139, 144 (1876); Harmon v. Kline, 52 Ark., 251, 252 (1889); Myrick v. Bill, 3 Dak., 284, 288 (1883); Ott v. Specht, 8 Hous-

ton, 61, 70 (Del., 1887); Binkley v. Forkner, 117 Ind., 176, 182 (1888); Brown v. Corbin, 121 Ind., 455, 457 (1889); Malott v. Price, 109 Ind., 22, 25 (1886); District Twp. of Corwin v. Moorhead, 43 Iowa, 466, 469 (1876); Melhop v. Meinhart, 70 Iowa, 685, 688 (1886); Marshall v. Bacheldor, 47 Kan., 442, 444 (1891); Commissioners of Rush County v. Stubbs, 25 Kan., 322, 325 (1881); Weber v. Gardner, 80 S. W., 481 (Ky., 1904); Peaks v. Hutchinson, 96 Me., 530, 535 (1902); Walker v. Schindel, 58 Md., 360, 368 (1882); Dolliver v. Ela, 128 Mass., 557, 559 (1880); Schellenberg v. Detroit Heating Co., 130 Mich., 439, 442 (1902); Deering v. Ladd, 22 Fed., 575, 576 (U. S. C. C., Minn., 1884); Stout v. Stoppel, 30 Minn., 56, 58 (1882); Warner v. Kenning, 25 Minn., 173, 175 (1878); Decell v. McRee, 35 So., 940 (Miss., 1904); Duke v. Shackleford, 56 Miss., 552, 555 (1879); State v. O'Neil Lumber Co., 77 Mo. App., 538, 545 (1898); Priestly v. Johnson, 67 Mo., 632, 636 (1878); Arlington Mill Co. v. Yates, 57 Neb., 286, 292 (1898); Burleigh v. Ford, 59 N. H., 536, 538 (1880); Boston Trust Co. v. Bankers' Tel. Co., 36 Fed. 288, 297 (U. S. C. C., N. Y., 1888); Kinsey v. Bailey, 16 Supr. Ct. (9 Hun.), 452 (1876); Farnsworth v. Western U. T. Co., 3 Silvernail, 30, 46 (Supr. Ct., N. Y., 1889); Sayles v. National Water Co., 16 N. Y. Supp., 555, 557 (1891); *Re* Smith, 119 Fed., 1004 (U. S. Dist. Ct., R. I., 1903); Sullivan v. Jones, 14 S. C., 362 (1880); Andrews v. Auditor, 28 Gratt., 115 (Va., 1877); Page v. Urick, 31 Wash., 601, 603 (1903); Watrous Engine Co., v. McCann, 21 Ont. App., 486 (1894); see, also, Fresno Bank v. Husted, 49 Pac., 195, 197 (Cal., 1897); Cochran v. Flint, 57 N. H., 514, 543 (1877); and, *post*, p. *150, as to such agreements between landlord and tenant.]

Gas pipes belonging to a gas company, laid in the streets of a city by permission of the corporate authorities, do not become the property of the city as a part of the realty, but remain the personal property of the company, and are taxable against the company as a part of a "manufacturing establishment." Memphis Gas Light Co. v. The State, 6 Cold., 310 (1869). [See *post*, p. *367. Gas pipes and mains affixed at points remote from the real estate of a gas company, remain personal property, and are not covered by a prior mortgage of the realty. Davidson v. Westchester Gas-Light Co., 99 N. Y., 558, 569 (1885). A mortgage of water pipes and mains must be recorded as a chattel mortgage. Dunsmuir v. Port Angeles Water Co., 24 Wash., 104 (1901). The owners of gas mains and pipes laid in public streets cannot, as "land-owners," oppose a public improvement. Cardiff Corp. Bill, 1 Rickards & S., 324 (Eng., 1894). Gas-pipe laid at the request of a land-owner, under an agreement that it should belong to the gas company, belongs to the company. Poughkeepsie Gas Co. v. Citizens' Gas Co., 27 Supr. Ct. (20 Hun.), 214, 216 (N. Y., 1880).]

In Taft v. Stetson (*supra*), A. placed upon the land of B. a steam engine and boiler set in brick laid with mortar, under an agreement by which they were to continue to belong to A. with the right of removal whenever he saw fit. B. afterwards mortgaged the land to A., who subsequently took possession for breach of condition, and afterwards removed

and sold the engine and boiler. On a bill to redeem the mortgage it was *held,* that the engine and boiler were the personal property of A., and did not pass by and were not included in the mortgage, and that therefore A. was not accountable to B. for their value. [See Hendy v. Dinkerhoff, 57 Cal., 3, 6 (1880), which was a contest between the "lessor" of a steam-engine and boiler and the vendor of the land under contract; and McLaughlin v. Lester, 4. N. Y. St. R., 852 (1886), where the grantee of a soap-factory was not entitled to a boiler and steam-pipe which was personal property between his grantor and a chattel mortgagee and a purchaser thereof at an execution sale, the annexation appearing to be slight.]

[A conditional sale of a refrigerating-plant for a brewery is valid as against the assignee of the buyer, although the plant becomes a part of the realty. Hercules Iron Works v. Hummer, 49 Ill. App., 598 (1893). In German Sav. Soc. v. Weber, 16 Wash., 95, 103 (1896), jambs, trimming, wainscoting, baseboards, sashes, doors and a mantle-piece, which were placed in a mortgaged house, all being removable without injury to the building or destroying their value as merchandise, remained the personal property of the seller reserving title. In Vulcan Iron Co. v. Rapid City Elevator Co., 9 Man., 577 (1894), contractors bought an engine, boiler, smokestack, machinery and materials for an elevator, the unpaid sellers reserving title and the right of removal. *Held,* that the owners of the elevator were in no better position than the contractors. So long as a machine has not been accepted by the buyer, and the seller retains the right of removal, it is a chattel as between the parties, although so attached to a building provided for it as to become a part of the structure. Frey-Sheckler Co. v. Iowa Brick Co., 104 Iowa, 494 (1898). See Fletcher v. Evans, 140 Mass, 241, 242 (1885), as to a monument, not accepted nor paid for, on burial lot.]

In Ashmun v. Williams, 8 Pick., 402 (1829), where a town house was erected on the land of the town under a contract with the builder, that the town should occupy a part of it at a specified rent and should have a right to purchase it at an appraised value, the house was held to be the personal property of the builder and subject to attachment for his debts. See, also, Yater v. Mullen, 23 Ind., 562; s. c., 24 Id., 277 (1865). [Where a one-story frame building is placed upon a stone foundation upon the land of another with an understanding that it should remain the property of the builder, and that the lot should be conveyed to him, the ownership of the building is not affected by a refusal of the land-owner to convey. Commissioners of Rush County v. Stubbs, 25 Kan., 322, 325 (1881). See, also, post, *272.] [Where the occupant of a house has no right, title nor estate in the land upon which it is situated, it can be sold without his wife's signature. Myrick v. Bill, 3 Dak., 284, 292 (1883).] [Where a party-wall is constructed upon the line between adjacent lots by one of the lot-owners, under an agreement that the other is to pay one-half its value when he elects to use it, the builder owns it absolutely until he is paid one-half the value, and is liable for any damage for failing to maintain

voluntarily without such an agreement, express or implied, it becomes the property of the owner of the soil, as stated in a previous chapter. This right of removal is also valid as against [*68] the *assignee of the owner of the soil, with notice of such an agreement; and a recovery of the land in an action to recover

it in a safe condition. Mickel v. York, 175 Ill., 62 (1898).] [Where a husband erected a house upon his wife's land under an agreement that he might remove it at pleasure, and an insurance policy on the house was issued to the husband and wife jointly, it was *held* to be entirely competent for all parties to treat this as joint property for the purpose of insurance. Kausal v. Minnesota F. Mut. Fire Ins. Ass'n, 31 Minn., 17, 24 (1883).] [A storehouse erected upon the land of another with the right of removal, is real estate as between the owner of the building and his tenant. Blanchard v. Bowers, 67 Vt., 403, 405 (1895).] [A shop, which the builder had a right to remove, was mortgaged by him as realty, and afterwards he made an assignment for the benefit of his creditors. *Held*, that, as between the mortgagee and the assignee, the building was realty. Stafford v. Adair, 57 Vt., 63, 66 (1885).] [A small house erected upon the land of another with the latter's consent, although it may belong to the builder, partakes so much of the nature of realty that it cannot be exempted as personal property. Lawson v. S. T. Barlow Co., 21 Ky. Law R., 308, 309 (1899).] [A provision in a contract that the title, ownership, and right of possession of machinery in a grist-mill shall remain in the party furnishing it, until paid, does not make it personal property to the extent of defeating a mechanic's lien. Cooper v. Cleghorn, 50 Wis., 113, 121 (1880).] In Connecticut, however, a distinction seems to have been taken between buildings and other annexations uopn the soil of another, the rule being declared to be, "that a fixed and permanent building erected upon another's land, even by his license, became his property; but if in its nature and structure it was capable of being removed, and a removal was contemplated by the parties, it was personal estate in the builder; and where the license was improperly revoked, resort must be had to a court of chancery." Benedict v. Benedict, 5 Day, 464, 467 (1813); Prince v. Case, 10 Conn., 375, 379 (1835); Baldwin v. Breed, 16 Conn., 60, 68 (1843). See, also, Leland v. Gassett, 17 Vt., 411 (1845). No good reason is perceived for such a distinction, and it is believed to be contrary to the weight of American authority. See the cases cited at the beginning of this note.

The owner of a boiler in the building of another, resting upon a brick or stone foundation and connected with the machinery of the mill by ordinary pipes, such boiler having been purchased and placed there by the lessees of the mill, and by them sold to the plaintiff, who had no interest in the freehold, may recover compensation from one who has hired and used it, whether it is real or personal property. Raddin v. Kidder, 111 Mass., 44 (1872).

the possession thereof brought by the owner or his assignee with notice, does not divest the title of the builder in the house.[1]

A limitation to the right of the parties to change, by their agreements, the status of property from that which the law would assign to it in the absence of a special agreement, has, however, been made in some cases, and the rule has been stated to be, that whether an agreement shall preserve the character of personalty in things so affixed to the freehold, as that but for such agreement, they could become part of the realty, depends upon their essential character, and the mode in which they are annexed, *e. g.*, whether they can be removed without serious damage to the freehold, or substantially destroying their own qualities and value.[2] Where the rights of third parties intervene,

[1] Dame v. Dame, 38 N. H., 429 (1859). [Western Union Telegraph Co. v. Burlington & S. W. R'y Co., 11 Fed., 1 (U. S. C. C., Iowa, 1882). See, also, *post*, p. *316).]

[The right to remove a steam-engine exists as against a trustee in bankruptcy. *Re* Smith, 119 Fed., 1004 (U. S. Dist. Ct., R. I., 1903).]

[2] Fortman v. Goepper, 14 Ohio St., 558, 564 (1863); Ford v. Cobb, 20 N. Y., 344 (1859); Sheldon v. Edwards, 35 N. Y., 283 (1866); Voorhees v. McGinnis, 48 N. Y., 278, 287 (1872); Eaves v. Estis, 10 Kan., 314 (1872). See, also, Tifft v. Horton, 53 N. Y., 377, 380 (1873); Benedict v. Benedict, Prince v. Case, Baldwin v. Breed, cited, *supra*. [See, *ante*, p. *23. Western Union Telegraph Co. v. Burlington & S. W. R'y Co., 11 Fed., 1 (U. S. C. C., Iowa, 1882); Southbridge Sav. Bank v. Exeter Mach. Works, 127 Mass., 542, 545 (1879); Andrews v. Powers, 66 App. Div., 216 (N. Y., 1901); German Sav. Bank v. Weber, 16 Wash., 95, 103 (1896); see, also, Kaestner v. Day, 65 Ill. App., 623, 629 (1895); McJunkin v. Dupree, 44 Tex., 500, 501 (1876).]

[Where machinery has been so annexed that it cannot be removed without material injury to the realty, a provision in a contract that, until paid for, the title, ownership and right to possession thereof shall remain in the party furnishing it, does not defeat his claim for a mechanics' lien. Cooper v. Cleghorn, 50 Wis., 113, 121 (1880).]

[Where a statute gives a mechanics' lien upon improvements erected by a lessee, it does not extend to such as are so merged in the freehold as to be incapable of severance. Rothe v. Bellingrath, 71 Ala., 55, 59 (1881).]

[That some of the articles cannot be removed from a building without being taken to pieces, does not affect the question of ownership. Walker v. Schindel, 58 Md., 360, 369 (1882).]

[That a frame building can be moved without destruction is evidenced by its size, and by the fact that it has been once moved. Commissioners of Rush County v. Stubbs, 25 Kan., 322, 325 (1881).]

[Plaintiff, under contract, erected a windmill pump upon a stock-farm.

the propriety and necessity of such a limitation will be very readily conceded; but, as between the immediate parties to the agreement, the limitation seems, to say the least, sufficiently [*69] strict; and where, as in the case of a house, *the materials might be of value after severance, no more reason is perceived why such an agreement should not be effectual as between the parties, than in the case of a fixture that might be removed uninjured, the difference between the two cases being not one of principle, but simply of degree, one of more or less.[1] As such an agreement relates to personal property, it may be by parol.[2]

The rule also applies to annexations made by a partnership to land belonging to one of the partners, with an understanding

The mill not fulfilling conditions, the land-owner rescinded the contract, and notified the plaintiff to remove it. The plaintiff contended that, the improvements having become a part of the realty, the defendant must accept them and prove damages. The court *held* that, as the improvements could be removed without any particular injury to the land, the defendant need not accept them if of no use. Wernli v. Collins, 87 Iowa, 548, 551 (1893).]

[1] See the cases already cited in this chapter; also *post,* mortgagor and mortgagee.

[2] Curtis v. Riddle, 7 Allen, 185 (1863). In Curtis v. Riddle, where such house was erected by C., on the land and with the consent of R., with money furnished by W., who already held a mortgage on the land, and who agreed with C. to advance the money and also assist in erecting the house, and take another mortgage to secure what he should so advance, which mortgage was afterwards executed by R., but without any special mention of the buildings thereon, it was *held,* that assuming that the dwelling house in question was personal property when first erected, yet the parol agreement of C., authorizing R. to mortgage it with the land, was equally valid with the verbal agreement that he, C., should have the house as personal property, and the effect of it would be to annex the house to the realty so far as the mortgage was concerned, and that R., whose mortgage to W. contained covenants of warranty, and who was then occupying the house, would hold the house as against a creditor of C., who attached the house as C.'s personal property, intermediate the agreement above referred to and the execution of the mortgage. The fact that C. also made a fraudulent bill of sale of the house to R. prior to the levy and the execution of the mortgage, was regarded as immaterial; while it would pass no title as against C.'s creditors, it would not prevent the house from passing to W. by the mortgage. [Walker v. Schindel, 58 Md., 360, 367 (1882); Tyson v. Post, 108 N. Y., 217, 221 (1888); Green v. Gresham, 21 Tex. Civ. App., 601, 604 (1899); see, also, Washband v. Washband, 24 Conn., 500 (1856); Watertown Steam Engine Co. v. Davis,

that the chattel annexed might be removed by the owners when deemed proper, and the interest of the individual partner, to whose land the chattel is annexed, in such chattel, is personalty, and not realty.[3]

The better reason and the weight of authority is, that such agreement or understanding, express or implied, must have existed prior to the annexation of the chattel to the land; and that if the thing is annexed by a stranger, without prior consent of

5 Houston (Del.), 192, 208; Farnsworth v. Western U. T. Co., 3 Silvernail, 30, 52 (Supr. Ct., N. Y., 1889).]

[An agreement between an owner of land, and one building a house thereon with right of removal, is not within the statute of frauds of Iowa, even conceding that the contract created an interest in lands. District Twp. of Corwin v. Moorehead, 43 Iowa, 466, 468 (1876).]

[3] See McDavid v. Wood, 5 Heisk., 95 (1871); Saunders v. Stallings, 5 Heisk., 65 (1871); Trappes v. Harter, 3 Tyrwh., 603, 617 (1833); *Ex parte* Lloyd, 3 Dea. & Ch., 765 (1834); s. c., 1 Mont. & Ayr., 494. [Young v. Baxter, 55 Ind., 188, 192 (1876); Walker v. Schindel, 58 Md., 360, 367 (1882); Borland v. Hahn, 25 N. Y. Supp., 131 (1893); see, also, Royce v. Latshaw, 15 Colo. App., 420.] See, however, Baldwin v. Breed, 16 Conn., 60 (1843); also (*ante*) page *59, note 1.

[Where a firm has a right to remove buildings erected upon land owned by one of the partners, the buildings remain personalty, as they are chattels as to the partner having no interest in the land, and they can not be realty as to one interest and personalty as to another. Kerr v. Kingsbury, 39 Mich., 150, 156 (1878).]

[Where land is owned by tenants in common, who are partners, but the land is not partnership property, annexation made by the firm will be treated as if annexed by one not having an interest in the soil, and not as if annexed by owners. Robertson v. Corsett, 39 Mich., 777, 783 (1878).]

[Where the owner of the fee grants to a railroad company a right of way as long as used, and then a firm, of which he is a member, erects a warehouse upon such right of way with the consent of the railroad company, which warehouse is subsequently sold, as between such purchaser and a grantee and heir of the owner of the fee, the warehouse is personal property. Evans v. McLucas, 15 S. C., 67 (1880).]

[Where four cabins are placed by one partner upon a plantation belonging to the other, the cost of which, under the contract, was to be borne by the latter, the partnership has no property in them. Penn v. Citizens Bank, 32 La. Ann., 195, 199 (1880).]

[Although machinery belonging to a partnership is, while upon the land of one of the partners, personal property, if the landowner sells the land and his interest in the machinery to his partner, and the latter continues

[*70] *the owner of the land, or any contract with him, express or implied, it cannot afterwards become personal property by the mere oral assent of the land owner, without a severance from the land.[1] It is not necessary, however, that such agreement as

to use the machinery in connection with the land, such machinery becomes a part of the realty. Bradley v. Ritchie, 12 Pa. Dist., 658 (1903).]

[A large barn, resting upon a stone foundation in the earth, although built in a partnership transaction upon the land of one of the partners, remains real estate, and can not be levied upon as personal property in the absence of a specific agreement that it was to remain such. Histe v. Buckley, 8 Ohio C. C., 470, 473 (1894).]

[1] Gibbs v. Esty, 15 Gray, 587 (1860); *Ex parte* Ames, 1 Lowell's Dec., 567 (1871); s. c., 7 Nat. Bank Reg., 236; Madigan v. McCarthy, 108 Mass., 376 (1871). In this case the only fact bearing upon this point, was that "it is admitted that the Pickmans [the owners of the land under whom the occupier was tenant at will], never would have claimed the building," and it was *held*, that, though this might be evidence of such a previous consent that the building should be put on the land as a personal chattel, yet it was not of itself, without the aid of other proof, sufficient to prove it, it being equally consistent with the idea that the house was put upon the land without their consent, but that they, by a subsequent assent, were willing, upon equitable considerations, to allow the tenant the benefit of his expenditures. In *Ex parte* Ames (*supra*), *per* Lowell, J., it is said: "It is argued on behalf of the assignees, that a contract to treat fixtures as chattels, whether it be express or implied, must be made before they are actually affixed to the realty; and for this some remarks of Dewey, J., delivering the opinion of the court in Gibbs v. Esty, 15 Gray, 587, are quoted. But those remarks appear to be intended only for parol agreements concerning buildings and fixtures annexed by a stranger, and to mean that such a parol agreement or license cannot change real into personal estate after its character has been once established." See, also, Burk v. Hollis, 98 Mass., 55 (1867), where it is held that where a house, built on the land of another as personalty, is by him conveyed to the owner of the land, it at once becomes real estate, and the owner of the land cannot, by executing a chattel mortgage to secure part of the purchase money, sever and convey as personal estate, any interest in it, merely by treating it as personal estate in the instrument of conveyance. [Bacon v. Bowdoin, 43 Mass., 591, 597 (1841). Buildings, which had been erected upon the lands of another without permission, were sold by the occupant; but before the purchaser removed them, the seller acquired title to the land, and died. The widow and heirs claimed the buildings, insisting that the buildings, at the time of their erection, became the property of the former landowner, and the sale thereof passed no title; but the court *held* that the buildings were personal property at the time of the sale, the title to which was impliedly warranted, and the heirs had no better right than the decedent. Myrick v. Bill, 3 Dak., 284 (1883).]

to sepa*rate ownership and right of removal should be [*71] express; it may be implied from the circumstances of the case, the relations of the parties, and from usage.[1] Thus, it is well

In Fuller v. Tabor, 39 Me., 519 (1855), however, where a party sold a shop to another, under an agreement that it was to remain his till paid for, and the house was moved upon the land of a third person, and underpinned and fitted for a dwelling without the previous knowledge or consent of the owner of the land, but who afterwards consented to its remaining there, it was *held,* in an action between the original owner of the house, who had not been paid therefor, and the vendee of the original purchaser, that the house was personal property. "The subsequent assent of Hoxie [the owner of the land], with a full knowledge of all the facts, was equivalent to a prior agreement, and relates back to the time the house was put upon his land. It would be absurd to hold that a man is compelled to become the owner of a house against his will, simply because his neighbor, acting under a misapprehension as to the title, had placed it upon his land without his knowledge and consent." It will be observed that in this case the question arose between third parties, and not between the owner or party annexing the structure and the owner of the land. See chap. 2, page *62. See, also, Hines v. Ament, 43 Mo., 298 (1869), where it was *held,* that permission to occupy for a series of years and a subsequent direction to remove the article in question (a line fence), were equivalent to an original agreement to place it there; Shell v. Haywood, 16 Penn. St., 530 (1851), and cases there cited; Foster v. Mabe, 4 Ala., 402 (1842); also the subject of severance, considered *ante,* ch. 1. Perhaps a distinction might properly be made as to the persons between whom the questions arise, *i. e.,* whether between the owner of the soil and the party making the annexation, or collaterally between third parties. See *ante,* p. *62.

[See Aldrich v. Husband, 131 Mass., 480, 481 (1881), and Murray v. Bender, 125 Fed., 705, 712 (U. S. C. C. A., Mont., 1903), as sustaining the statement made in the text. See, also, *Re* Perkins' Est., 26 Atl., 637, 638 (Vt., 1893), where the prior contract was void. Montgomery County v. Bean, 82 S. W., 240 (Ky., Sept. 28, 1904).]

[1] See Howard v. Fessenden, 14 Allen, 128 (1867); First Parish of Sudbury v. Jones, 8 Cush., 184, 190 (1851). See this subject further considered in the chapter on Landlord and Tenant, Trade Fixtures, etc. [Brannon v. Vaughn, 66 Ark., 87, 90 (1898); Price v. Malott, 85 Ind., 266, 269 (1882); Korbe v. Barbour, 130 Mass., 255, 257 (1881); Batcheller v. Commercial Assurance Co., 143 Mass., 495 (1887); Northwestern Ins. Co. v. George, 77 Minn., 319, 325 (1899); United States v. Smith, 110 Fed., 338 (U. S. Dist. Ct., N. Y., 1901); Alberson v. Elk Cr. Min. Co., 39 Ore., 552, 561 (1901); Gough v. Wood [1894], 1 Q. B., 713; see, also, Montooth v. Gamble, 123 Pa. St., 240 (1888); Lion Ins. Co. v. Wicker, 93 Tex., 397, 398 (1900).]

[An engine, boiler, machinery and buildings necessary for sawing lumber, erected by a grantee of the timber under permission from the

settled that an agreement for the right of removal, or that the article annexed shall remain as the personal property of the party annexing it to the land of another, may be implied from the fact that it was annexed with the previous consent or license of the owner of the land, when a different intention of the parties is not indicated by express agreement, the interest of the party making the erection, or his relation to the title of the land.[2] Such agreement or understanding may also be shown by

owner of the land, are removable after all the timber granted has been sawed. Johnson v. Willinghby, 3 Tenn. Cas. (Shannon), 338 (1875).]

[Where a statute provides that a school district shall not build a schoolhouse "on any site for which they have not a title in fee, without the privilege to remove the same," the right to remove will be implied. Burns v. School District, 61 Neb., 351, 353 (1901).]

[Where the equitable title to land is in one person, and the ownership of chattels in another, they remain personal property. Henkle v. Dillon, 15 Ore., 610, 616 (1888).]

[Where the owners of a mine erected buildings and machinery upon the surface, the surface being owned by others, the mine-owners could remove such buildings and machinery while their interest continued. Wake v. Hall (1883), 8 App. Cas., 195, aff'g (1880) 7 Q. B. D., 295.]

[An understanding that the landowner, under certain circumstances, is to pay for erections, implies ownership in the party making them. Korbe v. Barbour, 130 Mass., 255, 258 (1881).]

[2] Hinckley v. Baxter, 13 Allen, 139 (1866); Howard v. Fessenden, 14 Allen, 124, 128 (1867); Doty v. Gorham, 5 Pick., 487 (1827); Weathersby v. Sleeper, 42 Miss., 732 (1869); Northern Central Railway Co. v. Canton Co., 30 Md., 347 (1869); s. c., 8 Am. Law Reg. (N. S.), 540. [Wiggins Ferry Co. v. Ohio & Miss. R'y Co., 142 U. S., 396, 415 (1892); Webb v. State, 52 Ala., 422, 423 (1875); Medley v. People, 49 Ill. App., 218, 223 (1892); Fischer v. Johnson, 106 Iowa, 181, 186 (1898); Walton v. Wray, 54 Iowa, 531, 534 (1880); Heywood v. Tillson, 75 Me., 225, 229 (1883); Merchants' Bank v. Stanton, 55 Minn., 211, 219 (1893); 62 Minn., 204; Ford v. Burleigh, 62 N. H., 388, 391 (1882); Pope v. Skinkle, 45 N. J. Law, 39, 41 (1883); Cayuga R'y Co. v. Niles, 20 Supr. Ct. (13 Hun), 170, 172 (N. Y., 1878); McNair v. Rochester, N. P. & P. R. R. Co., 14 N. Y. Supp., 39, 41 (1891); Western N. C. R. R. v. Deal, 90 N. C., 110 (1884); see, also, Stirman v. Cravens, 33 Ark., 376, 385 (1878); Omaha Bridge & T. R'y Co. v. Whitney, 94 N. W., 513, 516 (Neb., 1903); 99 N. W., 525, 528 (Neb., 1904); Freeman v. Leonard, 99 N. C., 274 (1888); Burnside v. Marcus, 17 Up. Can. C. P., 430 (1867).] A. granted to B. and his heirs, liberty, license, power and authority to build on his, A.'s land, a bridge for public use, and B. covenanted to build the bridge in question, and to maintain the same in repair, and that such bridge, and the road leading to and from it, should forever remain as a public highway, free

from toll; *held,* that as against a wrong doer, the property in the materials of the bridge when built and dedicated to the public, still remained in B., subject to the public easement, and when severed and taken away by a wrong doer, he might maintain trespass *de bonis asportatis* therefor. Harrison v. Parker, 6 East, 154 (1805).

[Public bridges do not belong to the owner of the land upon which they rest. Shirk v. Board of Commissioners, 106 Ind., 573 (1886); Parsons v. Clark, 76 Me., 476, 479 (1884); Commonwealth v. Fitzgerald, 164 Mass., 587, 590 (1895).]

[Telephone poles, erected in a public street by license, the location of which the municipal authorities have authority to change from time to time as conditions seem to require, are subject to levy as personal property. Readfield Telephone Co. v. Cyr, 95 Me., 287 (1901).]

[See Mayer v. Waters, 45 Kan., 78, 82 (1890), as to buildings erected upon government land by post-traders. A building erected by a post-trader upon a military reservation for the purpose of carrying on his business, is removable by him, but may not be leased nor sold without permission. 14 Ops. Att'y Gen., 125.]

[The principle stated in the text is the same if part of the structure (in this case, water-pipe) is underground. Salley v. Robinson, 96 Me., 474, 479 (1902). See, also, Moore v. New Orleans Waterworks Co., 114 Fed., 380, 381 (U. S. C. C., La., 1902), as to water-pipes in public streets.]

In Baldwin v. Breed, 16 Conn., 60 (1843), where the question arose between tenants in common, it was held that the consent of one of the tenants in common to the erection by his co-tenant, of a store on the land, did not authorize the inference that either party contemplated that it should be the separate property of such co-tenant, or that he might remove it. See, also, Benedict v. Benedict, 5 Day, 464 (1813); Prince v. Case, 10 Conn., 378 (1835); also (*ante*) pages *58, *59, and notes. The right of the owner of a dwelling house standing upon the land of another, to hold it as personalty, is not lost by his moving out of the same preparatory to a sale of it as personalty, especially where he was authorized by one of the tenants in common of the land to allow the building to remain until he could dispose of it. Howard v. Fessenden (*supra*).

[A reservation, by the grantor of land, of the right to erect a dwelling-house, does not give the right to remove the house. Johnson v. Willinghby, 3 Tenn. Cas. (Shannon), 338 (1875).]

[That the owner of land mortgaged it to secure a debt owing by himself and another who erected a building upon the land, has no bearing upon the question whether such building was to remain the personal property of the builder. Neither does the fact that the building was erected with money furnished to the builder by a third party. Merchants' Bank v. Stanton, 55 Minn., 211, 218 (1893).]

[In Pope v. Skinkle, 45 N. J. Law, 39, 41 (1883), it is said, in regard to buildings erected by permission, that "the more reasonable inference would be that the builder had designed not to part with his property, and the landowner had consented on that understanding. The fact that the

former secured permission to build indicates that he sought to avoid the consequences of building without permission, among which by far the most serious would ordinarily be the loss of the labor and materials which he was about to convert into a building.'' See Wheeler v. McFerron, 33 Ore., 22, 25 (1898). Buildings erected by a husband upon the land of his wife with her knowledge and consent, do not necessarily become hers because attached to her land. Ferguson v. Spear, 65 Me., 277, 280 (1876).]

[A tramway connecting a saw-mill with a railroad, was laid by permission, over the land of another, which mill and the right to run the tramway was subsequently sold. The purchaser relaid the tramway with new rails, straightening his track somewhat, the landowner offering no objection. *Held,* that the purchaser had a right to remove the tramway. DeLaine v. Alderman, 31 S. C., 267 (1889).]

[A grantor of land reserved the mines and minerals and the right to him, his servants and carriages, to enter, mine and carry away same. He leased the mines and mining right, the lessee laying a railway for six miles over the granted lands. The rails were levied upon and purchased by the lessor, but not removed by him, and he evicted the lessee. *Held,* that the lessor was entitled to the rails as against the landowner. Antrim v. Dobbs (1891), 30 L. R., Ire., 424.]

[If a structure is erected upon land with the consent of the life-tenant, it will be the personal property of the builder, and the remainderman acquires no right thereto. Chicago & Alton R. R. Co. v. Goodwin, 111 Ill., 273, 281 (1884).]

[Where an agreement by a landowner allowed the owners of a mill the use of the land ''as long as they keep the mill upon it,'' the plain inference is that the owners of the mill have the right to remove it at discretion. Malott v. Price, 109 Ind., 22, 24 (1886).]

[If a licensee erects a building, he is entitled, upon revocation, to a reasonable opportunity to remove it, if such removal works no serious injury to the land. Ingalls v. St. Paul, M. & M. R'y Co., 39 Minn., 479 (1888).]

[Where the grantee of a lot under a void deed, erects a building thereon in good faith, the grantor having knowledge and not objecting, it operates as implied license by the grantor to make the improvement; and upon the grantor claiming the premises, the grantee has the right to remove the structure although the annexation to the soil is of a permanent nature and made with the intention of not removing it, and the occupancy of the grantee has not been disturbed. Little v. Willford, 31 Minn., 173 (1883).]

[A saw-mill erected upon the land of another under an agreement that, at a subsequent time, the landowner will buy the mill, or the mill-owner will buy the land, does not make the mill real estate for the purpose of attachment. Dodge v. Beattie, 61 N. H., 101 (1881).]

[If the head of a family owns a house and no interest or estate in the land on which it stands, the house is a chattel, and his home. Cullers v. James, 66 Tex., 494, 498 (1886).]

inference from *the subsequent recognition by the owner [*72] of the land, of rights which can result only from its existence, as by recognizing and treating the property as the personal property of the one who placed it upon the land.[1]

[1] Morris v. French, 106 Mass., 326 (1871); Howard v. Fessenden, 14 Allen, 129 (1867); in this case by consent of A., who was the tenant for life of land, B. put thereon a dwelling house and other buildings for his own use. On A.'s death, B.'s wife became a tenant in common of the land. B. and his wife thereafter conveyed their interest in the land, reserving the buildings, to C., who told B. the buildings might remain there till B. could have a chance to dispose of or remove them. The other tenants in common, by certain conversations, recognized the buildings as B.'s personal property. B. then moved from the dwelling, and nine days after sold the building to C. *Held*, in a proceeding for partition by one tenant in common against C., that a jury, from these facts, were justified in finding that the buildings passed to C. as personal property. See, also, Shell v. Haywood, 16 Penn. St., 523 (1851); Hull v. Alexander, 26 Iowa, 571 (1869); Foy v. Reddick, 31 Ind., 414 (1869). In Shell v. Haywood, the owner of a flouring mill contracted with machinists for the construction of a steam engine, boilers, etc., in his mill, the machinist to make and put up a complete machine, finding the materials, and to be paid on its completion. The balance wheel was delivered, but not set up. The boilers were laid loose on the foundation, and the walls and building to enclose them were partially completed by the owner of the mill (who was to prepare the foundation and inclosure), when he became embarrassed, and in a written agreement between him and the manufacturers, it was stated that the boilers and machinery attached or to be attached thereto, were the property of the manufacturers, and were to be left where they were three months, in order to give the vendee time to make an arrangement with his creditors, and if that could not be done, then the manufacturers were to be left to their legal remedy for materials already furnished, or to the removal thereof, at their option. *Held*, that, irrespective of the question whether attached to the realty or not, the manufacturers had the right to remove the same as against the sheriff, who had levied upon and sold them as personal property on a *fi. fa.*, against the owner of the mill, he having received notice of the claim of plaintiffs before making such sale. See Tripp v. Armitage, 4 M. & W., 687 (1839), *ante*, p. *7. The owner of the land may also doubtless estop himself from alleging that the annexation to his land is not personalty. Thus, where a steam saw-mill had been bought twice and sold once by the plaintiff (the owner of the land on which it stood), and assessed to him as personal property, it was held that, as between plaintiff, who had bought it subject to a chattel mortgage (part of which he paid), and an assignee of such mortgage, it would be treated as personalty, and the mortgage enforced. Denham v. Sankey, 38 Iowa, 269 (1874). See, also, Sheldon v. Edwards, 35 N. Y., 279 (1866). And where, under such circumstances, the plaintiff purchased

the mill and the lease of the land granted by him to the owner of the mill, such purchase was held not to extinguish the lien of such existing chattel mortgage upon the mill. Denham v. Sankey (*supra*).

[If an intending purchaser of lumber which forms part of houses, inquires of the landowner as to the right of the seller to dispose of it, and is informed that the seller has authority, and he thereupon purchases and pays for it, such landowner is estopped from asserting title to such lumber. Powers v. Harris, 68 Ala., 409, 411 (1880); Harris v. Powers, 57 Ala., 139, 144 (1876).]

[Where the plaintiff claims ownership to a house upon his land through a bill of sale, thus recognizing it as the personal property of the seller, he can not claim that a prior verbal sale by the seller was invalid. Apolo v. Kauo, 7 Hawaii, 755, 756 (1889).]

[A conveyance of land "except the mill and such other property as said G. may have on such lot," recognizes the mill-house as distinct from the lot, and as the property of G. Green v. Hammock, 13 Ky. Law R., 145, 146 (1891).]

[Where a life-tenant permits her son to make improvements, and appears as a creditor after he has made an assignment, she is estopped from claiming the improvements as against a purchaser under a decree for the settlement of the assignment. Watson v. Braun, 4 Ky. Law R., 981 (1883).]

[Where a lot, having a house thereon occupied by the builder, is sold for the value of the lot alone, it is inferred that the grantor never designed to claim or sell the house. Green Bay Lumber Co. v. Ireland, 77 Iowa, 636 (1889).]

[Where a grantee of land, under a warranty deed, in good faith began the erection of a factory thereon, and the rightful owner notified him of the adverse title, but said that he wanted the factory to progress and the question of title would be settled, it is evident that the boilers, engines and saw-mill machinery were treated as distinct from the land by both, especially as the land was in an unexplored wilderness and worth but two hundred dollars, while the machinery was worth thirty-two thousand dollars, and the mill was erected solely on account of the timber in the locality. Brown v. Baldwin, 121 Mo., 126 (1893).]

[Where mill-stones are placed in a mill under an agreement with the owner that they are to remain the separate property of the person placing them therein, and a subsequent purchaser of the mill allows the tenant to pay such person for the use of the mill-stones, there is strong ground for the inference that the purchaser recognized the right of such person to the mill-stones. Sullivan v. Jones, 14 S. C., 362, 366 (1880).]

[An elevator erected in another state upon a right of way under license from the railroad company, and admitted by the company to belong to the builder, is personal property, and an action for damages for injury thereto caused by negligently running cars into it, is transitory. Gregg v. Union Pac. R'y Co., 48 Mo. App., 494, 498 (1892).]

[For other cases illustrating the statement made in the text, see Nelson

Where an annexation to the soil of another is made after an *entry in pursuance of an order of the court for that [*73] purpose in proceedings for the condemnation of the land for public purposes, the owner of the land, upon the dismissal of such proceedings, is not entitled to the articles so annexed as a part of the realty, the original entry and annexation being rightful.[1]

If an intention to make an annexation a permanent accessession to the realty is manifest, it will of course prevail.[2]

v. Howison, 122 Ala., 573, 578 (1898); Mantooth v. Burke, 35 Ark., 540, 546 (1880); Brown v. Corbin, 121 Ind., 455, 457 (1889); Commonwealth v. Wesley, 166 Mass., 248, 252 (1896); Handforth v. Jackson, 150 Mass., 149, 153 (1889); Batcheller v. Commercial Assurance Co., 143 Mass., 495 (1887); Korbe v. Barbour, 130 Mass., 255, 258 (1881); Green v. Gresham, 21 Tex. Civ. App., 601, 602 (1899); see, also, Omaha B. & T. R'y Co. v. Whitney, 99 N. W., 525 (Neb., 1904); Conde v. Lee, 55 App. Div., 401 (1900), aff'd 171 N. Y., 662 (1902); and, *ante*, p. *46.]

[1] California Pacific R. R. Co. v. Armstrong, 46 Cal., 85 (1873); s. c., 1 Cent. Law Jour., 452. See (*ante*) page *58, note. The stone piers of a bridge built by a railway company, as a part of its road, on lands which it has acquired the right of using for its road, do not, though firmly imbedded in the earth, become the property of the owner of the land as a part of the realty. And on the project of completing the road being abandoned, the company may remove the structures as personal property. Wagner v. Cleveland, etc., R. R. Co., 22 Ohio St., 563 (1872). [But see Missouri Pac. R'y Co. v. Bradbury, 79 S. W., 966 (Mo. App., 1904).] So, as to the materials used in constructing the locks of a canal, after the easement over the land has been determined by the abandonment of the enterprise. Corwin v. Cowan, 12 Ohio St., 629 (1861). Whether the proceedings of a railroad corporation to condemn land for right of way, were sufficient to divest the owner's title or not, is immaterial, where after the proceedings, such as they were, there was no attempt on his part to prevent the execution of the work, and for a period of several years after such initiatory steps no dissent thereto nor claim of the iron laid down was made by such landowner; in such case the landowner must be assumed to have assented to the occupation of the land by the company, and cannot, as against a vendee of the company, take up and hold the railroad iron which had previously been laid down and spiked to sleepers by said company on said land. Dietrich v. Murdock, 42 Mo., 279 (1868). See, also, Deslogo v. Pearce, 38 Mo., 600 (1866).

[2] Thus, a permanent dwelling built in the usual way for a summer house upon the land of another, with his permission to occupy during his, the builder's lifetime, and set upon blocks and pillars, and so occupied for a period of nearly thirty years, being evidently intended and understood as

a consideration for the occupation rent free of the soil, is a fixture and cannot be removed by the tenant. The rule is thus stated: "Where the property of one has been attached to the freehold of another for a temporary purpose, with an express or implied agreement that it shall not be permanently annexed to the land, it may be removed when that purpose is satisfied." Reid v. Kirk, 12 Rich. Law, 54 (1859). Though the rule of law laid down in this case may be correct, *quaere* whether the same inference as to intention should be drawn from the facts stated.

So a house built and occupied by a reversioner with the assent of the tenant for life, who was his father, is presumed to be intended to be held as attached to, and part of, the realty, and is not personalty; and a conveyance as realty by the reversioner or his assignee in insolvency, will not entitle the grantee to enter and occupy the house as against the tenant for life. Cooper v. Adams, 6 Cush., 87 (1850).

In Wells v. Banister, 4 Mass., 514 (1808), it was held that where a son had built a house on the land of his father with his consent and under the expectation induced by his father's words that he would devise the land to the son, the father was not answerable to the son's creditors upon trustee process for the value of the house. This case also contains this statement: "The property of the house is personal property of the son, he having no estate in the land; and the most that can be made of the consent of the father to build upon his land, is a right to occupy the land without rent," etc. This *dictum*, as to the house being the personal property of the son, does not appear to have been a point necessary to the decision of the case, and has been since disapproved in Leland v. Gassett, 17 Vt., 403, 411 (1845). In this case a father permitted his son to enter upon a farm belonging to the father, clear, improve, and carry on the same for his own use and benefit, promising him that he would at some time thereafter, give him a deed of the same; and the son went on, and at his own expense erected a house placed upon a cellar dug and stoned up in the usual way, and having a stack of chimneys on a stone foundation, and a barn built in the usual manner, such buildings being erected with a view to their being permanent and remaining on the land, and being occupied by the son as a part of the estate to be deeded to him thereafter, and after carrying on the farm for some years the son died and the father refused to convey to his administrator or to permit him to occupy the buildings or remove them. *Held*, that the buildings became a part of the realty and could not be recovered in trover, the plaintiff's remedy, if he had any, being in chancery.

This case does not seem distinguishable in principle from the cases of annexations by parties holding land under contracts for a deed, to be considered hereafter, the annexations in such cases being made in contemplation of the future ownership of the land, and of course intended to be permanent. [See, *post*, p. *272.]

[See Humphreys v. Newman, 51 Me., 40, 50 (1863); Lacustrine Fertilizer Co. v. Lake Guano Co., 82 N. Y., 476, 481 (1880); Furrh v. Winston, 66 Tex., 521, 526 (1886); and Fowler v. Fowler, 15 N. Brunsw.,

The rule before laid down that the character of personal *property and the right of removal as against the owner [*74] of the soil, may be preserved by agreement between the parties, applies also to trees, plants and crops; where a crop has been sown upon the land of another under a parol license and agree-

488, 491 (1875), where an intention was shown to make annexations permanent.]

[The fact that a house rests upon posts does not give the mortgagor of the land any right to allow the builder to remove it, as against the mortgagee, where there was no intention, at the time of its erection, that the builder could remove it, the latter retaining ownership merely as security until paid for his labor and materials. Rowland v. Sworts, 17 N. Y. Supp., 399, 400 (1892).]

[A lean-to attached to a section-house upon railroad land occupied by a section foreman with his family under an agreement with the company, such lean-to having been built for a kitchen with the consent of the company, but with no provision for removal, can not be removed. Mueller v. Chicago, M. & St. P. R'y Co., 111 Wis., 300 (1901).]

[Where street railway track was laid upon the land of another with the understanding that the company would buy the land, and the extension of the road was for the purpose of inducing the purchase of lots in an addition owned by the company, an intention is shown to make the track permanent; and, upon its abandonment, the ties and rails belong to the landowner. Tudor Iron Works v. Hitt, 49 Mo. App., 472 (1892).]

[A building erected by a contractor for the landowner, can not be levied upon as the personal property of the contractor. Sleeper v. Emery, 59 N. H., 374, 375 (1879).]

[A contractor building a house became insolvent, and defendants, who had been engaged by him to do the plumbing, took out all of the plumbing that could be removed without substantial injury to the building. *Held,* that the defendants were liable to the owner of the building. Munroe v. Armstrong, 179 Mass., 165 (1901).]

[While it is the duty and right of a husband to provide a suitable burial place for his deceased wife, yet, when the body has been buried in the lot of another with the consent of the husband and of the lot-owner, the body becomes a part of the ground, and the husband can not remove the body without the lot-owner's consent. But, it seems, the husband might remove the body when the cemetery ceases to be used as a place of burial; and, under some circumstances, a court of equity might permit the removal of a body, as where it was understood that the interment was temporary. Pulsifer v. Douglass, 94 Me., 556, 558 (1901).]

[Where the supervisor of a plantation agrees to satisfy all "real charges," buildings erected by him become a part of the realty, and the supervisor is only entitled to their use during the continuation of his contract. Long v. Kee, 42 La. Ann., 899, 906 (1890).]

ment that it should belong to him who sowed it, and he is after- [*75] wards *expelled from the land and the crop harvested by the owner of the land, he may maintain an action therefor.[1]

See *post* Annexations to the Freehold of the Church.

[1] Harris v. Frink, 49 N. Y., 24 (1872). The possession in this case was under a parol contract to purchase void by the Statute of Frauds, and the crop was put in with the vendor's consent and the assistance of his agents who were paid therefor by the vendee as hired men by the day; Smith v. Jenks, 1 Den., 580 (1845); s. c., 1 N. Y., 90. See, also, King v. Wilcomb, 7 Barb., 263 (1849); Oliver v. Vernon, 6 Mod., 170 (1704); s. c., Holt, 332. See (*post*) Emblements.

[Where nursery stock upon mortgaged land has been purchased, but not removed, and the mortgagee, who afterwards acquires a sheriff's deed to the land, promises the purchaser that he would not claim the trees, he is estopped from refusing a removal of the trees. Wallace v. Dodd, 136 Cal., 210 (1902).]

CHAPTER IV. [*76]

OF FIXTURES AS BETWEEN LANDLORD AND TENANT.

The general rule of law being as hereinbefore stated, that whatever is fixed to the soil becomes a part of the realty, and subject to the same rules of law as the soil itself, every case in which there exists the right of severing and removing a thing which has been affixed to the soil of another is considered as an exception to the general rule above stated; though, as we shall hereinafter see, in some relations the exceptions have become more extensive than the cases governed by the rule itself.

With respect to these exceptional cases the article annexed is not by reason of its annexation considered as an irrevocable gift to the owner of the soil to which it is so annexed; but within certain limits as to the time within which it must be done, etc., it may be severed from the realty and removed against the will of the owner of the soil.

With reference to the nature of this right of removal, it is obvious that it differs materially from that by virtue of which the general owner of the soil, in right of his general dominion over it and every part of it, severs and removes property annexed to the freehold, which was, before such annexation, and is after severance, of a chattel nature. Such general owner may exercise the right of severance with reference to any kind of annexation uncontrolled by any limitations as to time, manner, etc., except as limited by the general police power of the State and the application of the maxim, "*sic utere tuo, ut alienum non laedas.*" But with reference to the right of severing and removing fixtures, conferred by law upon one not the owner of the soil, but who has, for some purpose of his own, more or less temporary, made such annexations, such is not the case; his right of *removal arises not merely from his interest in, and do- [*77] minion over, the land, but is a special privilege conferred by the law in certain cases from reasons of public policy upon certain

classes of persons, in derogation of what would otherwise be the rights of the owner of the soil. The nature of this right of removal has been explained in two ways: by supposing that the chattel nature of the thing is preserved after its annexation, or, by considering that the thing ceases to be a chattel by being affixed to the land, and becomes real property, but reducible again to a chattel state by separation from the realty.[1] There is some confusion and looseness of expression among the authorities on this subject, occasioned probably by the fact that in some relations and for some purposes, as in favor of the execution creditors, or the executors of a tenant, the chattel nature of the thing is not lost by its annexation. For many, if not most purposes, however, during the continuance of the annexation, the thing is treated as a parcel of the realty; and though it is in the power of the party making the annexation to reduce the thing again to the state of goods and chattels by severance, yet until so severed, it remains a part of the realty;[2] and this

[1] Ferard Fixt., 10.

[2] See, generally, Lee v. Risdon, 7 Taunt., 188, 191 (1816); Hallen v. Runder, 1 Cr. M. & R., 266, 275 (1834); Mackintosh v. Trotter, 3 M. & W., 184 (1838); Minshall v. Lloyd, 2 M. & W., 450 (1837); Dumergue v. Rumsey, 2 H. & C., 777, 790 (1863); Holland v. Hodgson, L. R., 7 C. P., 328, 336 (1872); s. c., 26 L. T. (N. S.), 709; Boyd v. Shorrock, L. R., 5 Eq., 78 (1867); Barnett v. Lucas, 5 Ir. R. Com. Law, 140 (1870); Lee v. Gaskell, 45 L. J. (Q. B. D.), 540 (1876); Bliss v. Whitney, 9 Allen, 114 (1864); Raddin v. Arnold, 116 Mass., 270 (1874); Guthrie v. Jones, 108 Mass., 191 (1871); Preston v. Briggs, 16 Vt., 129 (1844); Prescott v. Wells, 3 Nev., 82 (1867). [Hyatt v. Vincennes Nat. Bank, 113 U. S., 408 (1884); Freeman v. Dawson, 110 U. S., 264, 270 (1883); Commercial Bank v. Pritchard, 126 Cal., 600; San Francisco Breweries v. Schurtz, 104 Cal., 420, 427 (1894); First Nat. Bank v. Adam, 138 Ill., 483, 498 (1891); Dobschuetz v. Holliday, 82 Ill., 371, 374 (1876); Bauernschmidt Co. v. McColgan, 89 Md., 135, 137 (1899); McIver v. Estabrook, 134 Mass., 550, 553 (1883); *Ex parte* Makepeace, 31 N. C., 91, 95 (1848); Darrah v. Baird, 101 Pa. St., 265, 273 (1882); Sampson v. Camperdown Mills, 64 Fed., 939, 942 (U. S. C. C., S. C., 1894); Orient Ins. Co. v. Parlin-Orendorff Co., 14 Tex. Civ. App., 512 (1896); Miller v. Muirhead (1894), 21 Sess. Cas., 4th Ser., 658, 660; see, also, McNally v. Connolly, 70 Cal., 3, 6 (1886); Nordyke v. Hawkeye Woolen Co., 53 Iowa, 521, 524 (1880); State v. Marshall, 4 Mo. App., 29, 33 (1877); Hilton Lumber Co. v. Murray, 47 App. Div., 289, 293 (N. Y., 1900); Steers v. Daniel, 4 Fed., 587, 598 (U. S. C. C., Tenn., 1880); Wylie v. Karner, 54 Wis., 591, 597 (1882); Cowan v. Assessor for Midlothian (1894), 21 Sess. Cas., 4th Ser.,

812, 815.] In Minshall v. Lloyd, *supra,* Parke, B., said: "The principle of law is that '*quicquid solo plantatur solo cedit.*' The right of a tenant is only to remove during his term the fixtures he may have put up, and so to make them cease to be any longer fixtures. That right of the tenant enables the sheriff to take them under a writ, for the benefit of the tenant's creditors. I assent to the doctrine laid down in Coombs v. Beaumant [5 B. & Ad., 72 (1833)]; and Boydell v. McMichael [1 C. M. & R., 266 (1834)], that such fixtures are not goods and chattels within the bankrupt law, though they are goods and chattels when made such by the tenant's severance, or for the benefit of execution creditors." See the subject of bankruptcy, considered further on, page *333.

Where a railway company, for the purpose of their undertaking, required a portion of the premises leased to the plaintiff for a term of 99 years, on which there was an iron manufactory containing trade fixtures, which were removable by the tenant during his term; and such company was required by the plaintiff under the 92 Sec. of the Lands Clause Consolidation Act, providing that no party shall be required at any time to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if such party be willing to sell and convey the whole thereof; and, Sec. 80, giving to any person having a house, building or manufactory, a right to require such company to take the whole, not only of the land, but the house, building or manufactory, it was *held,* that the company was bound to take and pay for such trade fixtures, on the ground that they were a parcel of the realty, the exception in favor of the tenant's trade fixtures only existing in favor of the removal, and not to their annexation to the freehold. Gibson v. Hammersmith, etc., Railway Co., 2 Drew. & Sm., 603 (1862); s. c., 9 Jur. (N. S.), 221; 32 L. J. Ch., 337; 11 W. R., 299; 8 L. T. (N. S.), 43; approved in Cotter v. Metropolitan Railway Co., 12 W. R., 1021 (1864); s. c., 10 L. T. (N. S.), 777. This subject was somewhat considered in *Ex parte* Lloyd (or Loyd), 3 Dea. & Ch., 765, 779, 781 (1834); s. c., 1 Mont. & Ayr., 494; 3 L. J. (N. S.), Bank., 108, by Erskine, C. J., who said: "But where any fixture is annexed by the tenant, it does not necessarily become a part of the freehold; but its character as realty or personalty depends upon the nature of the fixture, and the purpose for which it was annexed." * * * "The right of the tenant's executor to such [trade] fixtures at his death, and the right of the sheriff to take them in execution under a *fi. fa.* against the tenant's goods and chattels, seems to me to confirm the principle adopted in Trappes v. Harter [3 Tyr., 603 (1833)], that in all questions between the landlord and tenant, they retain during the term their character of personalty, and do not become a parcel of the realty, until the tenant shall have left them annexed at the end of the term; when, according to Lord Holt's language in Poole's case [1 Salk., 368 (1703)], 'they become a gift in law to him in reversion, and are not removable.'" See, also, *Ex parte* Belcher, 2 Mont. & Ayr., 160, 167 (1835); s. c., 4 Dea. & Ch., 703; 4 L. J. (N. S.), Bank., 29; Finney v. Watkins, 13 Mo., 291 (1850).

[*78] seems to apply as well to trade fixtures as to *other fixtures.[1] A distinction is, however, made in this respect between fixtures and furniture, which, though fastened to the walls for [*79] safety and convenience, is not considered as annexed *to

It does not seem, however, to be true that in all questions between landlord and tenant, fixtures retain their character of personalty during the term, or during annexation, *e. g.*, in an action for the price they cannot be treated as goods. Lee v. Risdon, and Hallen v. Runder (*supra*). And generally as regards the remedy, they seem, during annexation, to be considered as realty. See chapters on Bankruptcy, Mortgagor and Mortgagee, Remedies, etc. (*post*). The subject will be further considered in the progress of the work.

[Fixtures, so long as they remain attached to the realty, are not goods and chattels, and the price thereof can not be recovered under a declaration for goods sold and delivered. Donnelly v. Thieben, 9 Ill. App., 495, 500 (1881). The right given to tenants to remove buildings does not make such buildings mere chattels. Hilton Lumber Co. v. Murray, 47 App. Div., 289, 293 (N. Y., 1900). A building which the lessor has the option to take at the expiration of the lease, is a chattel real, and an easement of way may be acquired in connection therewith. Newhoff v. Mayo, 48 N. J. Eq., 619, 623 (1891); Mayo v. Newhoff, 47 N. J. Eq., 31, 35 (1890).]

Where the plaintiff, who had no interest in the freehold, bought from the lessees a boiler placed by them in the mill demised to them, which boiler while so annexed was hired from the plaintiff and used by the defendant, it was held that the defendant, having hired and used the boiler, was liable in an action to recover compensation for its use; and that it was immaterial whether it was real or personal property. Raddin v. Kidder, 111 Mass., 44 (1872).

[1] See next note (*supra*). See, however, *Ex parte* Goreley, 13 W. R., 60 (1864); s. c., 11 L. T. (N. S.), 319; 10 Jur. (N. S.), 1085; 34 L. J. (N. S.), Bank., 1. In this case, under sec. 83 of 14 Geo. 3, c. 78, enacting that on the request of any person interested in any house or building insured, or on the suspicion of fraud, the insurance office shall be empowered and required to cause the moneys to be expended in rebuilding, reinstating or repairing such house or building, or shall take security that the person to whom they shall pay the moneys, shall so expend them, where a demise was accompanied by a covenant not to remove the fixtures, trade or otherwise, at the expiration of the tenancy, and trade fixtures were added by the lessee and were insured by him. *Held*, that the insurance money on the fixtures did not fall within the operation of said sec. 83. The Lord Chancellor said that, "the question then was, when the fire took place were the fixtures, which were trade fixtures added by the lessee, a part of the building within the meaning of the section?" This, he thought, ought to be determined by the answer to another question: were

the realty, and hence remains subject to the rules governing personalty.[2]

The most ordinary instances of the exercise of this right of *removal occur between parties sustaining to each other [*80]

the fixtures at the time in such a condition, that if the landlord had made a conveyance by the description of all that house and building with its rights, members, and appurtenances, the fixtures would pass? The fixtures were trade fixtures, and, but for the covenant, would have been removable at the time of the fire. Whatever right the lessor had to them, was derived under the personal covenant of his lessee, and did not spring out of his relation as landlord to his tenant; it was a personal, and not a real right, contingent and future, and not present or vested; he thought that if a conveyance had been made in the terms he had above mentioned, the fixtures would not have passed. If that were so, the insurance money on the fixtures did not fall within the operation of the 83d section of the 14 Geo. 3, c. 78, and those moneys were, therefore, properly payable to the assignees, and not to the lessor or the mortgagee. He would be understood as confining his judgment to the question before him, viz.: whether the fixtures were so blended with the freehold as that the insurance moneys would fall within the 83d section or not, and did not intend in any way to interfere with the decision of the House of Lords, in Holroyd v. Marshall, 11 W. R., 171. He was of opinion that the fixtures were, at the time of the fire, not an integral part of the building, and the money not within the application of the section. See, also, Cook v. Champlain Transp'n Co., 1 Den., 102 (1845). See, however, Mayor, etc., of N. Y. v. Hamilton Fire Ins. Co., 10 Bosw., 537 (1863); same v. Brooklyn Fire Ins. Co., 41 Barb., 231 (1864); same v. Exchange Fire Ins. Co., 9 Bosw., 424 (1862); s. c., 3 Abb. Ct. App., Dec., 261 (1867), cited in a subsequent portion of this volume.

[2] Guthrie v. Jones, 108 Mass., 191 (1871). In this case, a glass case, a case of drawers and a mirror about six feet long by two feet wide, bought by the tenant of an eating house where intoxicating liquors were sold, to use in his business, and screwed or nailed by him to the walls, and gas fixtures (so called), bought by him for the same purpose, and screwed by him upon the gas pipes fastened to the ceiling, though fastened to the walls, were considered as not annexed to the realty so as to become a part of it, but to be in their nature furniture, and hence personalty, for which, after demand and refusal, trover would lie by the tenant against the landlord, though still attached to the walls; but an oyster and trench counter, and a bar, nailed to the floor, were considered as realty so long as annexed. S. P., and probably s. c., *nom.* McLeod v. Jones, 3 Mass. Dig., 353. [See, *post*, p. *436. Fore v. Hibbard, 63 Ala., 410, 412 (1879).]

[The character of an article as furniture is not changed by the fact that, by reason of its size, it was not necessary to paint and finish the wall behind it which it concealed. Kimball v. Grand Lodge, 131 Mass., 59, 63 (1881).]

the relation of landlord and tenant, which will form the subject of this chapter. The subject may be conveniently considered with reference (1) to Trade Fixtures, and Fixtures erected for Trade Purposes, combined with other objects; (2) Agricultural Fixtures; (3) Fixtures set up for purposes of Ornament or Convenience, or for Domestic Use; (4) When the Right of Removal must be exercised; (5) Of the Right of Removal as affected by Special Agreements in relation thereto between Landlord and Tenant.

I. Trade Fixtures, and Mixed Cases.

As shown in a preceding chapter, with reference to the legal effect of annexations upon the land of another with his consent, the agreement of the parties in relation thereto may, and often does, exercise a controlling influence in determining whether an annexation may be severed and removed by the party annexing it. It is proposed, however, in this connection, first, to consider the subject independently of any special agreement between the parties relative to the right of removing fix- [*81] *tures, (which will be hereinafter considered), and with reference only to the ordinary relation of landlord and tenant, unaffected by any special terms in the demise controlling the general rights of the tenant in relation thereto.

The general maxim of the law in respect to annexations made by a tenant to the soil of his landlord during the existence of his term, is, as has been already stated, *quicquid plantatur solo, solo cedit;* and that anything so affixed by a tenant cannot be afterwards severed and removed by him, either during the continuance or at the end of his term, without the permission of his landlord, without his incurring the penalty of waste.[1] Although, however, the rule is as above stated, it has

[1] See Co. Lit., 53 a; Elwes v. Maw, 3 East, 38 (1802), and cases there cited; Gibson v. Hammersmith, etc., Railway Co., 2 Drew & Sm., 608 (1862). Waste is thus defined in McCullough v. Irvine, 13 Penn. St., 440 (1850): "Waste is spoil or destruction committed in houses or other corporeal hereditaments to the injury of one who has the remainder or reversion in fee." "Any act which does permanent injury to the freehold or inheritance is waste." As the destruction of a dovecote by a tenant. Kimpton v. Eve, 2 Ves. & B., 349 (1813); but removing presses

long been subject to numerous exceptions, and its great hardship and injustice to tenants very much mitigated; so that at the present day the exceptions have become, with the limitations to be hereinafter noticed, perhaps more extensive than the rule itself. The progress and growth in number and importance of these exceptions afford a very instructive example of the elastic and accommodating nature of the English common law and its adaptation to the ever varying necessities and demands of society. The rule appears originally to have been enforced with very little regard to the object of the annexation or the real intention of the party in making it. And this was *not repugnant to the then received notions respecting the [*82] relative importance of the land and the thing annexed, for the land was then regarded as pre-eminently the principal, and commerce and the arts had not yet conferred upon personal property the importance which it now possesses. There seems also during the period covered by the early reports to have been no such recognized, substantive, legal term as fixtures, which is comparatively a modern word;[2] but the subject was viewed

eo nomine by a tenant, is not waste unless they are fixed to the freehold. Kimpton v. Eve (*supra*).

So, if a lessee pull down a brew house and build tenements on its site, it is waste, even if the rent is thereby improved. Cole v. Forth, 1 Mod., 95 (1682); s. c., styled, however, Cole v. Greene, 1 Lev., 309; Greene v. Cole, 2 Saund., 252. So, if a termor destroy a wall or partition within a house to unite the chambers: 10 Hen. 7, 2 b, pl. 3 (1494); or remove a door and cheek posts of a house added by him during his tenancy: Cooke's case, Moore, 177 (1582); or pull down a house erected by him during his term: 17 Edw., 2, 518 (1324).

[It is waste for a tenant to remove the elevator, heating-plant, plate glass, staircase and wainscoting from a building erected by him; and an incoming tenant can have such removal enjoined. Palmer v. Young, 108 Ill. App., 252, 257 (1903).]

[Where the removal of an addition erected by a tenant would leave one end of the main building exposed and in need of repairs, it is waste. Holmes v. Standard Pub. Co., 55 Atl., 1107 (N. J. Ch., 1903).]

[See, also, Laidlaw v. Taylor, 2 Nova S. L. R., 155 (1881), in regard to glass in door.]

[2] In Sheen v. Rickie, 5 M. & W., 175, 182 (1839), Parke, B., says: "It is a very modern word." And as a substantive term, the author has never met with it in the Year Books or the old reports, abridgements or digests, unless placed there by some modern hand in the process of revision. We find, however, the adjuncts "fixe" and "annexe" used in

almost wholly from the standpoint of the landlord, and with reference to his remedies for waste committed by the tenant. In process of time, however, owing, doubtless, as well to the hardship and injustice of the old rule, as to principles of public policy growing out of the increasing importance of trade and personal property, certain exceptions before alluded to were engrafted upon the old rule, and have since been amplified and firmly settled by a series of judicial decisions greatly mitigating the rigor of the old rule so far as it concerned tenants.

By the common law, an action of waste lay in three cases only: tenancy by the curtesy, tenancy in dower, and guardianship in chivalry; which estates being created by act of the law, were protected by the law from abuse by the tenants;[3] but prohibition of waste did not lie at common law against [*83] *tenants for life or years, because they came in by their own act, and it might have been provided that no waste should be done.[4] This doctrine being found very inconvenient, as such tenants by taking advantage of the ignorance of their landlords might commit waste with impunity, the defect was sought to be remedied by the Statute of Marlbridge, 52 Hen. 3, c. 23 (*anno* 1267), which provided that "fermors, during their terms, shall not make waste, sale, nor exile of house, woods, and men, nor of anything belonging to the tenements that they have to ferm, without special license had by writing of

the Year Books to express the relation a thing sustains to the frank tenement or inheritance. See 20 Hen. 7, 13, b, pl. 24 (1504); 21 Hen. 7, 26 (1506); and in Wiltshear v. Cottrell, 1 Ell. & Bl., 674, 682 (1853), Lord Campbell said: "I do not know that 'fixture' is a legal term at all; it is not in Termes de la Ley."

The ancient rules of law on the subject as connected with the subjects of waste, executors and administrators, may be found under those heads; but the term "fixtures" as a substantive term in the law regarding the subject from the tenant's standpoint, does not seem to have been then used. See, also, Brown Fixt. Introduction, §§ 4, 5.

[3] Co. Lit., 53 a, *et seq.;* 2 Inst., 145, 299; Doct. & St. Dial. 2, ch. 1, 2; 2 Saund., 252, n. 7; 1 Greenl. Cru. Dig., Tit., 3, ch. 2, § 25, *et seq.*, p. 119. Some have thought, that at common law, waste did not lie against tenant by the curtesy. 2 Inst., 145, 301; Br. Abr., Waste, 88. [See, *post*, p. *390.]

[4] Co. Lit., 53 b; 2 Inst., 299; Doct. & St. Dial. 2, ch. 1, 2; 1 Greenl. Cru. Dig., Tit. 3, ch. 2, § 25, *et seq.*, p. 119. [See, *post*, p. *390.]

covenant, making mention that they may do it; which thing if they do, and thereof be convict, they shall yield full damage, and shall be punished by amerciament grievously." The Statute of Gloucester, 6 Edw. 1, c. 5 (*anno* 1278), increased the punishment by enacting that he who should be attainted of waste should lose the place wasted, and should make recompense of thrice so much as the waste should be taxed at.[5] By a liberal construction, the last mentioned statute was held to apply to tenants from year to year, and tenants for part of a year.[6] It thus appears that though in general the maxim was *quicquid plantatur*, etc., yet, at the common law, before the statutes above referred to, though it seems to have been regarded as against conscience for a tenant for life or years to injure the inheritance,[7] there was no remedy therefor, unless *it was stipulated that no waste should be committed. [*84] After these statutes, however, and in consequence thereof, questions respecting the right of tenants for life or years to remove things annexed by them to the soil of their landlord during their terms, began to furnish questions for judicial determination.

The exception in favor of the tenant, said by some to have been first established, relates to fixtures erected by a tenant upon the demised premises for the purpose of carrying on his trade and manufacture.

The case usually referred to in this connection, as the earliest authority on the subject, is reported in the Year Book,

[5] This statute is translated thus: "It is provided, also, that a man from henceforth shall have a writ of waste in the chancery against him that holdeth by law of England, or otherwise for term of life, or for term of years, or a woman in dower. (2) And he which shall be attainted of waste shall lose the thing [*la chose*] that he hath wasted, and, moreover, shall recompense thrice so much as the waste shall be taxed at. (3) And for waste made in the time of wardship, it shall be done as is contained in the Great Charter. (4) And where it is contained in the Great Charter, that he which did waste during the custody, shall leese the wardship, (5) it is agreed that he shall recompense the heir his damages for the waste, if so be that the wardship lost do not amount to the value of the damages before the age of the heir of the same wardship." [See *post*, p. *391.]

[6] Co. Lit., 54 b; 2 Inst., 302; Plowd., 467.

[7] See Doct. & St. Dial. 2, ch. 1.

42 Edw. 3, p. 6, pl. 19 (1368), where the right of a tenant for years to remove a furnace erected by him during his term, was doubted and adjourned. The furnace in this case seems, from the remarks upon the case in a subsequent case reported in the Year Book, 21 Hen. 7, 26 b, to have been fixed to the walls of the house.

In a case reported in 20 Hen. 7, 13 b, pl. 24 (1504), where it was held that a furnace erected by the ancestor and annexed to the frank tenement with mortar was parcel of the realty, and could not lawfully be removed by his executors as against the heir, we find in the course of the opinion of the court (Rede, C. J., Fisher and Kingsmil, JJ.), the following statement: "And if a lessee for years makes such a furnace for his advantage,[8] or a dyer makes his vats and vessels for carrying on his occupation[9] during the term, he may remove them; but if he permit them to remain fixed to the earth after the end of his term, then they belong to the lessor; and so of a baker. And it is no waste to remove such things during the term, *per Ascuns.*"[10] At the end of the case it is [*85] *stated that in 42 Edw. 3, it was doubted whether this was waste or not. This case is usually cited as the first in terms recognizing the right of a tenant to remove fixtures; and it is also cited as an authority for the early existence of the exception in favor of trade fixtures, because the privilege, which is there said to belong to the lessee, is admitted in respect of

[8] "*pur son avantage.*"

[9] "*pur occupier son occupation.*"

[10] "*Per Ascuns*" it seems should be translated "according to some," or "in the opinion of some." There has, however, been some difference of opinion as to the true meaning of the expression. In Elwes v. Maw, 3 East, 38 (1802), it was translated by the counsel thus: "It is no waste to remove such things within the term by any." Lord Ellenborough in the same case translates it: "It is not waste to remove such things within the term by some." Both of these translations leave it doubtful whether the last two words of the sentence do not refer to tenants. The original reads, and is punctuated thus: "*Et n'est ascun waste de remuer ticls choses dcins le terme, per Ascuns.*" A proper regard for correct usage seems to render it the preferable opinion that the words "*per Ascuns,*" refer to the word judges, as understood though not expressed, and it is so understood by Messrs. Ferard (Ferard Fixt., 24, note b), and Brown (Brown Fixt., § 46), in their works on fixtures.

trade only; and is to be understood as a right arising solely out of the principle of protecting commerce and manufactures. Whether the *dictum* above quoted is or is not properly cited as an authority for so early an existence of the exception in favor of trade fixtures, about which some difference of opinion has hitherto existed, is now practically a matter of small consequence, as the exception itself has long been firmly established; but as it may prove a matter of interest to the student of this branch of the law, we quote in the note below the observations of Mr. Ferard and others on the subject in question.[1]

[1] Ferard Fixt., 23. "This case is generally adduced as the first which in terms recognizes the right of a tenant to remove fixtures. It is quoted, moreover, as the great authority for the prevalence of a rule, in very early times, in favor of trade fixtures. For it is insisted, that the privilege which is there said to belong to the lessee, is admitted in respect of articles of trade only, and is to be understood as a right arising solely out of the principle of protecting commerce and manufactures. The expression in the original which has given rise to the supposition, is *'pour occupier son occupation'*; and it has been imagined, that the instances of the dyer's vessels are intended, not merely to signify additions made by a tenant for his common domestic accommodation, but to indicate fixtures put up by him expressly in relation to the trade which he is carrying on upon the premises.

"It may, however, be doubted if this is a fair inference from the case cited. For, in the first place, it deserves to be mentioned, that in another report, (*a*) or rather abstract of the case in the Year Book, 20 Hen. 7, which was published at a subsequent, but very early period, the passage upon which the supposition in question mainly proceeds is particularly introduced, but the expression *'pour occupier son occupation'* is left out. If this circumstance had been suggested to the courts in the discussion of the subsequent cases, it would probably have been thought to merit attention, as tending to show that the rule laid down by the judges in the time of Henry the Seventh was not universally considered to have been founded on an exception arising solely out of trade. And the inference that trading fixtures were not particularly and exclusively

(*a*) "It is a book printed A. D. 1614, entitled, *'Un Abridgment de touts les Ans del Roy Henric le Sept,'* and the position in question is thus expressed: 'and if lessee for years makes any such furnace for his pleasure, or a dyer makes his vats and vessels, he may remove them during the term,' etc., 'and so of a baker, and some, *semb.*, that it is not waste to remove such things within the term, but this is contrary to the opinions aforesaid,' etc."

intended by the judges in this case, will more closely appear from the remark which follows in the report, viz.: that in 42 Ed. III., it was doubted whether this was waste or not. Now, on referring to the case in 42 Ed. III., p. 6, pl. 19, it will appear that no allusion whatever is made to an exception in favor of trade, neither is it mentioned or implied that the furnace there in dispute was erected for a trading purpose. Again, in the same sentence in which the dyer's vat is mentioned, and immediately before it, is put the instance of a furnace erected by a lessee, and this is said to be removable like the vat. And so far from its being intimated that the furnace is connected with trade, it is, on the contrary, described as put up for the convenience of the lessee, '*pour son avantage,*' or (as the abridgement has it) '*pour son pleasure*' (*a*). But further, if this principle of allowing an exemption on the ground of trade had been clearly recognized in the case in question, it might be expected that it would have been applied to the solution of subsequent cases. But the contrary is the fact; and all the ancient cases which follow the decision of 20 Hen. VII., are found to proceed upon a distinction depending altogether upon the mode of annexation. Thus, in a case which occurred immediately afterwards, and before the same judges, (*b*) it was laid down by the court, that if a lessee makes an erection, as a furnace or post, etc., and fixes it to the soil, or to the middle of the house only, and not to the walls, he may take it away. Nothing is said in this case of a distinction in respect of trade; on the contrary, Kingsmil, J., apparently in allusion to the particular instances of vats in a brew house or dye house, relies solely on their construction and annexation; and says the removal of such things would not be waste, because the house would not be impaired by it. So, lastly, in the cases which followed some time after those in the Year Books, there is no recognition whatever of any peculiar privilege in regard to trade. For Cook's case (*c*), (24 Eliz.), is wholly silent upon it. And in a case reported in Owen, 70, and Cro. Eliz., 374 (*d*), (which respected the power of a sheriff to seize a furnace under an execution against a termor), the article is expressly stated to have been erected for the use of a dyer; and the court, adverting to the right of the termor himself in such a case, determine it by the circumstance of the article being fixed to the walls, and not to the middle of the house. On this particular ground they consider that the furnace would not be removable; and the principle of an exemption on the ground of trade is altogether unnoticed (*e*).

(*a*) And see 8 Hen. VII., 12.

(*b*) 21 Hen. VII., 26 b, pl. 4; and see Bro. Abr. tit. Chattels, pl. 7, 11.

(*c*) Moore, 177.

(*d*) Day v. Austin and Bisbitch, 37 Eliz., and see 1 Roll. Ab., 891, pl. 50.

(*e*) In the report of this case, as cited in Went. Off. of Ex., p. 61, it is said that the jury found that by the *custom* of Kent, the lessee might remove such articles.

*Poole's Case,[1] decided before Holt, C. J., at *nisi prius*, [*86] in Middlesex, in the year 1703, seems to have been the first case that put the question upon a clear and satisfactory basis, and *since that decision the right of the tenant during the [*87] term to remove his trade fixtures, has been often and uniformly recognized as a settled rule of law.[2] This was a case where a tenant *for years had made an under-lease of a house to [*88] an under-tenant, who was by trade a soap-boiler, and who, for the convenience of his trade, put up fats, coppers, tables, partitions, and paved the back side, etc., and thereafter, upon a *fieri facias* against such under-tenant, the sheriff took up all these things, and left the house stripped and in a ruinous condition, so that the first lessee was liable to make it good, and thereupon brought a special action on the case against the sheriff and those that bought the goods for the damage done to the house;

"Upon the whole, then, it can scarcely be inferred that the expressions used by the court in 20 Hen. VII., 13, were employed in any other sense than as mere general examples of fixtures, the object of which was to illustrate the legal doctrine of an exception introduced for the benefit of all tenants alike, by a less rigid construction of the old rule of law. Indeed, with regard to the dictum itself, it should be observed that it is entirely extrajudicial, and appears in a decision in which the judgment of the court proceeded on a totally different principle." Mr. Brown, in his work on Fixtures (§§ 45-47), advocates the same idea. On the other hand, it was observed by the English editor of Smith's Leading Cases (2 Smith's Lead. Cas., *240), with reference to this case, as follows: "Mr. Amos, in his valuable work, contends, with much ingenuity, that this case establishes an exception in favor of other fixtures set up by lessees for years, besides trading fixtures, and he argues that the words '*si le lessee a fait ascun furneis pur son avantage*,' must be taken to mean, if the lessee have set up any furnace for his pleasure: and he cites a book entitled '*Un Abridgement de touts les ans du Roy Henri le Sept*,' where the words '*pur son plesure*' are subtituted for '*pur son avantage*.' But this abridgement is scarcely to be relied on, for it omits the subsequent words '*pur occupier son occupation*,' which are very important to the question mooted by Mr. Amos. There certainly appears to be some improbability in the idea of the lessee having put up a furnace in his house for pleasure. Besides, Co. Lit., 53 a, is express that in ordinary cases a furnace could not be removed; and if it were removable in all cases, why should the words '*pur son avantage*' have been added at all?" See, also, Elwes v. Maw, 3 East, 38 (1802).

[1] 1 Salk., 368 (1703); s. c., Holt, 65.

[2] See the cases hereinafter cited in this chapter.

and it was held, that during the term the soap-boiler might well remove the fats he set up in relation to trade, and that he might do it by the common law (and not by virtue of any special custom), in favor of trade and to encourage industry. But after the term they become a gift in law to him in reversion, and are not removable.

The principle upon which the privilege of removing trade fixtures was granted to the tenant, was stated by Lord Holt in Poole's case, above cited, to be in favor of trade and to encourage industry; and this view has received the support of many eminent judges, and may probably be regarded as the original ground of the exception. The same ground has also been stated in other cases arising in the courts of equity and common law between executors of tenant for life and the remainder-man, and between executor and heir, some of which are referred to in the note below.[3]

[3] In Lawton v. Lawton, 3 Atk., 13 (1743), the material question was whether a fire engine set up for the benefit of a colliery by a tenant for life should be considered as personal estate and go to his executor, or fixed to the freehold and go to the remainder-man. In relation to this question, Lord Hardwicke said: "But then it has been insisted that fixing it in order to make it work, is properly an annexation to the freehold. To be sure, in the old cases, they go a great way upon the annexation to the freehold, and so long ago as Henry the Seventh's time, the courts of law construed even a copper and furnaces to be part of the freehold. Since that time, the general ground the courts have gone upon, of relaxing this strict construction of law is, that it is for the benefit of the public to encourage tenants for life to do what is advantageous to the estate during their term." See, also, Dudley v. Warde, Ambl., 113, 114 (1751); Penton v. Robart, 2 East, 88 (1801); Bull. N. P., 34; Lawton v. Salmon, 1 H. Bl., 259, note (1782); s. c., 3 Atk., 16 note; Mansfield v. Blackburne, 6 Bing. N. C., 439 (1840); Elwes v. Maw, 3 East, 38 (1802); Gibson v. Hammersmith, &c., Railway Co., 2 Drew & Sm., 608 (1862); Powell v. Monson Man'f'g Co., 3 Mason C. C., 465 (1824); Van Ness v. Pacard, 2 Pet., 143 (1829); White v. Arndt, 1 Whart., 94 (1835). In Elwes v. Maw (*supra*), Lord Ellenborough said: "In deciding whether a particular fixed instrument, machine, or even building, should be considered as removable by the executor, as between him and the heir, the court, in the three principal cases on this subject (viz., Lawton v. Lawton, 3 Atk., 13; * * * Lord Dudley and Lord Warde, Ambler, 113; * * * and Lawton, executor, v. Salmon, E., 22 G. 3, 1 H. Bl., 259 *in notis*, * * *) the court may be considered as having decided mainly on this ground: that where the fixed instrument, engine or utensil (and the

While the ground above stated was doubtless the original and main ground for making the exception as to trade fixtures, *as between landlord and tenant, it does not now seem to [*89] be the only ground upon which it may be satisfactorily rested. The rule may now properly be said to be founded upon a variety of reasons, among which may be mentioned the grounds of public policy already stated, and that the intention of the tenant in making the annexation for the purposes of trade, his interest in the land being only limited and temporary, is not ordinarily thereby to make a permanent accession to the realty, but simply with the view of better enjoying the articles annexed, or using them in the way of his trade, as chattels, and with the intention of removing such articles, on the termination of his interest in the land. It is accordingly held that such intention is always a material inquiry in determining whether an article is removable as a trade fixture.[4] And if the intention clearly

building covering the same, falls within the same principle) was an accessory to a matter of a personal nature, that it should be itself considered as personalty. The fire engine in the cases in 3 Atk., and Ambler, was an accessory to the carrying on the trade of getting and vending coals; a matter of a personal nature."

[4] Linahan v. Barr, 41 Conn., 471 (1874). In this case a leased building having been destroyed by fire, the lease having yet two years to run, the tenant erected a one-story brick building on the old foundation walls, except in the rear, which was an unbroken brick wall from the cellar bottom, saying at the time to the landlord that he knew it would belong to the landlord, that he did not intend to remove it at the expiration of his lease, and that the rent which he would receive during the term would pay the cost of construction. *Held*, that these declarations of the tenant were admissible in evidence to show the intention of the tenant in erecting the building, as against a purchaser from the tenant claiming the right to remove the building as a trade fixture at the end of the term; and that these declarations and the manner of construction (which latter, though not conclusive, is an important consideration), showed the intent of the lessee that the building should become a part of the realty. So held on a petition for an injunction to prevent the removal of the building. See, also, Wall v. Hinds, 4 Gray, 271 (1855). [See Morey v. Hoyt, 62 Conn., 542, 557 (1893); Sowles v. Raymer, 110 Mich., 189 (1896). Where a tenant, in fulfillment of a covenant in his lease, erects a frame building, thirty by sixty, on brick foundations sunk into the earth, it shows an intent that it should not remain the tenant's property. Deane v. Hutchinson, 40 N. J. Eq., 83 (1885). To have the right to remove erections placed upon the premises by a tenant, they must have been made under

such circumstances as show that the tenant made them of his own volition and for his own benefit, intending that they should remain his property, and not in fulfillment of a duty owing the lessor. Tunis Lumber Co. v. Denis Lumber Co., 97 Va., 682, 686 (1899). In Holmes v. Standard Pub. Co., 55 Atl., 1107, 1108 (N. J. Ch., 1903), the fact that the tenant had taken a five-year lease, with option to renew or purchase, tended, with other facts, to indicate an intention to make a building permanent; and an offer by the tenant to repair the injury occasioned by the removal of a fixture, has no bearing upon the question of his intention in making an annexation, and can not affect the landlord's rights. That the landlord and tenant were brother and sister, and that no rent was paid, leads to the conclusion that a structure erected by a tenant was intended to be permanent. Forteseue v. Bowler, 55 N. J. Eq., 741, 745 (1897).] So in Seeger v. Pettit, 77 Penn. St., 437 (1875), it was *held*, that evidence that a firm (the tenants), treated the articles in question as their own property, and included them among their assets, was competent on the question of intention.

[On the subject of intention, see Royce v. Latshaw, 15 Colo. App., 420, 424 (1900); Western & Atlantic R. R. Co. v. State, 14 L. R. A., 438, 453 (Ga. Spec. Com., 1891); Gordon v. Miller, 28 Ind. App., 612, 616 (1901); Ryder v. Faxon, 171 Mass., 206, 208 (1898); Carver v. Gough, 153 Pa. St., 225, 228 (1893); Straight v. Mahoney, 16 Pa. Super., 155, 158 (1901); and, *ante*, pp. *22 and *41.]

[An intention not to make an annexation permanent is shown by making a return thereof as taxable personal property; which is not overcome by the fact that the tenant had a right to purchase the premises, no steps having been taken to make such purchase. Barker v. Cincinnati Brick Co., 4 Ohio Dec., 270, 271 (1896); by the assent of the lessor in the lease to the erection of a building by the lessee, and a direction by the lessor that it should be so built that it could be removed when the lease expired, and by the lessor making no reply when told by the lessee that he would have to mortgage the building to pay for it. Ryder v. Faxon, 171 Mass., 206, 208 (1898); by the lessor claiming a lien. Cuppy v. O'Shaughnessy, 78 Ind., 245, 249 (1881); by a contract that the lessor has to buy. New Orleans v. Russ, 27 La. Ann., 413 (1875); by the annexation being undesirable except upon the improbable hypotheses that the landlord would not lease the premises for any other use than a meat-market. Ward v. Earl, 86 Ill. App., 635, 640 (1899); by giving a chattel mortgage for the price, and a bill of sale. Hewitt v. Watertown Steam Engine Co., 65 Ill. App., 153, 157 (1895). See, also, Bernheimer v. Adams, 70 App. Div., 114, 118 (1902), aff'd 175 N. Y., 472 (1903); by giving a chattel mortgage for the price, by the lessor levying upon the property, and where it would be unreasonable to suppose that a lessee would add three thousand dollars' worth of property to a mine which he had leased for nine months. Hewitt v. General Electric Co., 164 Ill., 420, 424 (1897); 61 Ill. App., 168, 169 (1895); by the landlord, after the termination of the lease, making no claim to the property and preferring

appears to make the articles annexed a permanent accession to the realty, *pur un profit del' enheritance,* or *perpetui usus causa,* such intention will prevail, and such articles may not *thereafter be removed without the permission of the [*90] landlord.[1] With regard to the comparative extent to which this

that it should be removed, and the property having caused an expense of two thousand dollars under a lease for a single year. Crerar v. Daniels, 109 Ill. App., 654, 656 (1903); by the annexation not having been made to the walls nor to the foundations of the building, and by the tenant's selling them, and an endeavor of the landlord to buy them. Baker v. McClurg, 96 Ill. App., 165, 171 (1901), aff'd 198 Ill., 28 (1902); by the articles having been made in sections and so fastened as to be removed readily. Roth v. Collins, 109 Iowa, 501, 503 (1899).]

[Where a building is leased for a short term for a roller skating rink, and the lessee covenants not to injure the floor, and that certain kinds of skates would not be used unless the floor was protected, and that he will leave the premises in repair, this implies that he would remove a floor covering the original floor and making it higher, and which could be removed without injury to the freehold. Howell v. Listonville Rink Co., 13 Ont., 476, 492 (1886).]

[The right given in the lease to the lessees to use standing timber for such buildings as they should erect, was a concession by the lessors, and does not in any manner affect the right of removal. Conrad v. Saginaw Min. Co., 54 Mich., 249, 257 (1884).]

[Yielding possession may be evidence that a structure was not intended for the purpose of trade, and that it is abandoned, but it will not change its established character. Western N. C. R. R. v. Deal, 90 N. C., 110, 113 (1884).]

[Because the lessee is given the privilege, in his lease, of buying the land, does not show a conclusive presumption that a building was placed thereon by him with the intention of permanently annexing it to the freehold. Osborn v. Potter, 101 Mich., 300, 302 (1894); but where he erects a five thousand dollar warehouse, it is evidence of an intention to make it permanent. Bank of Louisville v. Baumeister, 87 Ky., 6, 16 (1888). See, also, *post,* p. *158, and Hussey v. Ryan, 64 Md., 426, 434 (1885), where it says that "as the lot was a vacant one when he leased it, the presumption is, that he has the ownership of and the right to enter and take away all structures erected by him during his tenancy."]

[1] The different intentions with which the annexations are made, and the different effects given to such intentions, are well illustrated in the Year Book, 20 Hen. 7, 13 b, pl. 24 (1504), with reference to annexations made by the ancestor *pur un profit del' enheritance,* as contrasted with annexations made by a lessee for years *pur son avantage; pur occupier son occupation;* though of course the fact that the annexation was made by the ancestor would alone furnish a strong presumption that it was in-

relaxation of the rule has been carried, it may be remarked generally that the privilege of removing fixtures is construed more liberally in favor of the tenant in cases arising out of the ordinary relation of landlord and tenant, than in the cases arising between tenant for life or in tail and the remainderman or reversioner, or between the executor of tenant in fee and the heir, in which last case there is the least relaxation;[2] while, with reference to trade fixtures as between landlord and tenant, the rule is even more liberally extended and applied than with reference to ordinary cases of fixtures other than trade fixtures [*91] *arising between those or other parties.[3] And hence it is usually stated that in general the decisions in favor of the executors of tenants for life, in tail, or in fee, as against the remaindermen, reversioners or heirs, may be considered as of authority to sustain the right of an ordinary tenant to remove fixtures as against his landlord; and that the decisions in each of those relations may be considered as of authority in the relations where the rule is more liberally applied.[4]

tended for the benefit of the inheritance, which does not exist in the case of a lessee for years. See remarks of Erskine, C. J., in *Ex parte* Lloyd (or Loyd), 3 Dea. & Ch., 765, 779 (1834), s. c., 1 Mont. & Ayr., 494. See, also, the preceding note and the subsequent chapter, considering the relation of executor and heir; Wall v. Hinds, 4 Gray, 271 (1855). [Baker v. McClurg, 96 Ill. App., 165, 171 (1901), aff'd 198 Ill, 28 (1902); Weller v. Everitt, 25 Vict., 683, 686 (1900).]

[A portable engine and saw-mill placed upon land by a lessee for ninety-nine years, are not fixtures. Hughes v. Edisto Shingle Co., 51 S. C., 1, 29 (1897).]

[2] Lawton v. Lawton, 3 Atk., 13, 15, 16 (1743); Dudley v. Warde, 1 Ambl., 114 (1751); Elwes v. Maw, 3 East, 38 (1802); Lee v. Risdon, 7 Taunt., 191 (1816); Whitehead v. Bennett, 27 L. J. (N. S.), Ch., 475 (1858); s. c., 6 W. R., 351; Van Ness v. Pacard, 2 Pet., 143 (1829); Wall v. Hinds, 4 Gray, 270 (1855); White v. Arndt, 1 Whart., 95 (1835); Harkness v. Sears, 26 Ala., 496 (1855); Cannon v. Hare, 1 Tenn. Ch., 22, 34 (1872); 1 South. Law Rev. (1872), p. 240. [Youngblood v. Eubank, 68 Ga., 630, 633 (1882); Baker v. McClurg, 96 Ill. App., 165, 172 (1901); McMath v. Levy, 74 Miss., 450, 451 (1896); Polle v. Rouse, 73 Miss., 713, 718 (1896); Springfield Co. v. Cole, 130 Mo., 1, 9 (1895); Belvin v. Raleigh Paper Co., 123 N. C., 138, 143 (1898); Asheville Co. v. Southwick, 119 N. C., 611, 616 (1896).]

[3] Whitehead v. Bennett, 27 L. J. (N. S.) Ch., 475 (1858); s. c., 6 W. R., 351; Van Ness v. Pacard, 2 Pet., 143 (1829). [See, *post*, p. *128.]

[4] See those relations considered *post*.

The question as to what particular articles erected by a tenant on the demised premises in relation to his trade, come within the protection of the law as being trade fixtures, and hence removable by the tenant at the expiration of his term, gives rise to a great variety of considerations as to the nature of the article, its use, the degree of annexation, etc. Such annexations may consist of articles of machinery, utensils, etc., of a perfect chattel nature before annexation was made, and capable of detachment and use elsewhere in connection with other realty; or the articles annexed may consist of buildings, etc., of a more or less substantial and permanent nature, more or less capable of removal and reconstruction, and which, having been constructed upon the land, have hitherto had no existence as integral chattels, except in connection with the land whereon they stand.

It has long been well settled that mere utensils or machines and other articles of a similar nature, being themselves of a chattel nature, and capable of being detached without material injury to the freehold or themselves and of being set up and used elsewhere, are removable by the tenant or his vendee during his term.[5] The tenant's right of removing his trade fixtures may also be sold or mortgaged by him as personalty,

[5] See Poole's Case, 1 Salk., 368 (1703); s. c., Holt, 65, where the vats, coppers, tables, partitions, etc., of a soap-boiler were held removable fixtures.

So, as to the vats and vessels of a dyer. 20 Hen. 7, 13 b, pl. 24 (1504); 21 Hen. 7, 26 b (1506), *semble*. See, also, Kelsey v. Durkee, 33 Barb., 410 (1861).

So, as to the furnace of a dyer. Day v. Austin, Owen, 70 (1595); though a distinction was taken between a furnace fixed to the middle of the house and to the wall, which distinction may now probably be regarded as exploded. See, also, Kelsey v. Durkee, 33 Barb., 410 (1861). [See, however, Baker v. McClurg, 96 Ill. App., 165, 171 (1901), aff'd 198 Ill., 28, 40 (1902), where the fact that the annexation was not made to the wall nor to the foundation but in the middle of the building, was regarded as evidence of intention.]

[So, as to steam heater. Podlech v. Phelan, 13 Utah, 333, 340 (1896). See, also, Insurance Co. of N. America v. Buckstaff, 92 N. W., 755 (Neb., 1902).]

[So, as to a range. Townsend v. Underhill, 6 Pa. Co., 544 (1889). See, also, Livingston v. Sulzer, 26 Supr. Ct. (19 Hun), 375, 380 (N. Y., 1879).]

[So, as to furnace-doors. Hackett v. Bennett, 12 N. S. W., Supr. Ct., 327, 333 (1874).]

[So, as to a "reel" oven, extending from foundations laid in the earth, through the basement and first and second stories nearly to the roof. Baker v. McClurg, 96 Ill. App., 165 (1901). See, also, Rosenau v. Syring, 25 Ore., 386, 390 (1894), as to a bake-oven of brick resting upon a platform supported by posts set upon the ground.]

So, as to distillery fixtures, and machinery consisting of pipes, copper stills, kettles or boilers masoned up in brickwork, and a steam tub, coolers and worm connected with the boilers by logs and braces affixed to the building, etc. Reynolds v. Shuler, 5 Cow., 323 (1826); Moore v. Smith, 24 Ill., 512 (1860); s. c., 26 Ill., 392. See, also, Terry v. Robins, 13 Miss., 291 (1845).

So, as to the retorts, cisterns, etc., of an oil refinery. Bidder v. Trinidad Petroleum Co., 17 W. R., 153 (1868).

[So, as to an iron tank upon a foundation of brickwork and cement. Cooper v. Johnson, 143 Mass., 108 (1886).]

So, as to salt pans set up by a tenant in salt works. See Lawton v. Salmon, 1 H. Bl., 259, note (1782); s. c., 3 Atk., 16 note, per Lord Mansfield; Earl of Mansfield v. Blackburne, 6 Bing. N. C., 426 (1840); s. c., 8 Scott, 720, per Tindal, C. J.

So, as to steam engines erected by a tenant, for years or for life, for trade purposes. Lawton v. Lawton, 3 Atk., 13 (1743); Dudley v. Warde, 1 Ambl., 113 (1751); Moore v. Wood, 12 Abb. Pr., 393 (1860); Merritt v. Judd, 14 Cal., 59 (1859); Lacey v. Giboney, 36 Mo., 320 (1865); Lemar v. Miles, 4 Watts, 330 (1835); Hey v. Bruner, 61 Penn. St., 87 (1869); Minshall v. Lloyd, 2 M. & W., 450 (1837); Davis v. Moss, 38 Penn. St., 346 (1861). See, also, Kelsey v. Durkee, 33 Barb., 410 (1861); Cook v. Champlain Transpor. Co., 1 Den., 102 (1845). [Updegraff v. Lesem, 15 Colo. App., 297 (1900); Baker v. McClurg, 96 Ill. App., 165 (1901); Gordon v. Miller, 28 Ind. App., 612, 614 (1901); Smith v. Whitney, 147 Mass., 479, 482 (1888); Conrad v. Saginaw Min. Co., 54 Mich., 249 (1884); Torrey v. Burnett, 38 N. J. Law, 457, 458 (1875); Conde v. Lee, 55 App. Div., 401 (1900), aff'd 171 N. Y., 662 (1902); Pronguey v. Gurney, 37 Up. Can. Q. B., 347, 355 (1875); Byrnes v. Macarthur, 2 N. S. W. L. R., 57 (1881).]

So, as to iron rails laid by a tenant in a tunnel in a coal mine. Heffner v. Lewis, 73 Penn. St., 302 (1873). [See, *post*, p. *105. Couch v. Welch, 24 Utah, 36, 47 (1901); Antrim v. Dobbs (1891), 30 L. R., Ire., 424.]

[So, as to casing in an oil or gas well, a derrick and other appliances. Shellar v. Shivers, 171 Pa. St., 569 (1895); Siler v. Globe Glass Co., 21 Ohio C. C., 284, 288 (1900).]

[So, as to a shaft-house and mining machinery. Updegraff v. Lesem, 15 Colo. App., 297 (1900).]

So, as to steam boilers, etc., though inclosed in brick. Davis v. Moss; Moore v. Wood; Lacey v. Giboney; Hey v. Bruner (*supra*). See, also, Kelsey v. Durkee, 33 Barb., 410 (1861); Holbrook v. Chamberlin, 116

Mass., 155 (1874). [Baker v. McClurg, 96 Ill. App., 165 (1901); Gordon v. Miller, 28 Ind. App., 612, 614 (1901); Smith v. Whitney, 147 Mass., 479, 482 (1888); Cooper v. Johnson, 143 Mass., 108 (1886); Winner v. Williams, 82 Miss., 669 (1903); Conde v. Lee, 55 App. Div., 401 (1900), aff'd 171 N. Y., 662 (1902); Pronguey v. Gurney, 37 Up. Can. Q. B., 347, 355 (1875); Hughes v. Towers, 16 Up. Can. C. P., 287 (1865); Byrnes v. Macarthur, 2 N. S. W. L. R., 57; see, also, Livingston v. Sulzer, 26 Supr. Ct. (19 Hun), 375, 380 (N. Y., 1879); so, as to an upright boiler to spray oil on brick-kilns, and a pressed brick machine bolted to a brick foundation in the ground. Barker v. Cincinnati Brick Co., 4 Ohio Dec., 270, 271 (1896).]

So, as to shafting, belting, etc. Moore v. Wood; Holbrook v. Chamberlin; Hey v. Bruner (*supra*). [Baker v. McClurg, 96 Ill. App., 165 (1901); Hughes v. Towers, 16 Up. Can. C. P., 287 (1865).]

So, as to gas fixtures in a store. Lawrence v. Kemp, 1 Duer, 363 (1852); *Ex parte* Morrow, 1 Lowell's Dec., 386 (1869); s. c., 2 N. B. R. (2d ed.), 665. See Guthrie v. Jones, 108 Mass., 191 (1871); Seeger v. Pettit (*infra*). [See, *post*, p. *137. McCall v. Walter, 71 Ga., 287, 290 (1883); Smusch v. Kohn, 49 N. Y. Supp., 176 (1898); Argles v. McMath, 26 Ont., 224, 248 (1895), aff'd 23 Ont. App., 44, 47 (1896); see, also, Felcher v. McMillan, 103 Mich., 494, 499 (1894). That gas-fixtures are removable as between grantor and grantee, see, *post*, p. *299. As to plumbing and gas-fittings, see Livingston v. Sulzer, 26 Supr. Ct. (19 Hun), 375, 380 (N. Y., 1879); Dunn v. Garrett, 7 N. Brunsw., 218, 222 (1851).]

[So, of gas-pipes and water-pipes. Atkinson v. Noad, 14 Low. Can., 159 (1863).]

So, of sitting stools. Lawrence v. Kemp (*supra*). [So, as to opera-chairs. Pratt v. Keith, 5 Montg. Co. (Pa.), 113, 114 (1889).]

So, as to platform scales. Seeger v. Pettit, 77 Penn. St., 437 (1875); Allen v. Kennedy, 40 Ind., 142 (1872); Bliss v. Whitney, 9 Allen, 114 (1864). The scales in this case were set in the highway, and extended under a building on adjoining land, and up into a room where the weight was ascertained. [McCall v. Walter, 71 Ga., 287, 290 (1883).]

So, as to shelving in a store. *Ex parte* Morrow, 1 Lowell's Dec., 386 (1869); s. c., 2 N. B. R. (2d ed.), 665. [Berger v. Hoerner, 36 Ill. App., 360 (1889); Roth v. Collins, 109 Iowa, 501, 503 (1899); Carlin v. Ritter, 68 Md., 478, 493 (1888); Cubbins v. Ayres, 72 Tenn., 329 (1880); Argles v. McMath, 26 Ont., 224, 248 (1895), aff'd 23 Ont. App., 44, 47 (1896); Laidlaw v. Taylor, 2 Nova S., 155 (1889); see, also, Josslyn v. McCabe, 46 Wis., 591, 592 (1879); Orr v. Davis, 17 N. Z., 106, 109 (1898). In Cubbins v. Ayres, *supra*, the shelving was in a hotel.]

[So, as to cases ten feet high, thirty feet long, containing drawers, cupboards and mirrors, with cornice at the top and heavy molding at the bottom. The base-board around the room did not extend behind the cases, and they were brought upon the premises in sections, and were fastened to the wall by nails. Kimball v. Grand Lodge, 131 Mass., 59 (1881).]

So, as to the hydraulic press of a tallow chandler, put into a hole in the ground and walled up with solid masonry, the bottom of the cylinder resting on flanges on the stone wall even with the floor, the part of the press around the cylinder nailed to the floor, and braced to keep it steady. Finney v. Watkins, 13 Mo., 291 (1850).

So, as to mill stones and machinery. See Deeble v. McMullen, 8 Ir. Com. Law, 355 (1857).

So, as to a corn mill and the machinery for running a chair-factory. Lacey v. Giboney, 36 Mo., 320 (1865). [See Garrison v. Webb, 107 Ala., 499 (1894), as to a saw-mill. So, as to a gang edger in a saw-mill. Stokoe v. Upton, 40 Mich., 581, 584 (1879). So, as to a long wall undercutter in a mine. Hewitt v. General Elec. Co., 164 Ill., 420 (1897); 61 Ill. App., 168 (1895). See, also, Gordon v. Miller, 28 Ind. App., 612, 614 (1901); Wentworth v. Woods Co., 163 Mass., 28, 33 (1895); Byrnes v. Macarthur, 2 N. S. W. L. R., 57 (1881); and Boyd v. Wilson, 18 Rev. Leg., 65 (1883), as to machinery.]

So, as to railway iron, frogs, spikes and bolts. Northern Central Railway Co. v. Canton Co., 30 Md., 347 (1869); s. c., 8 Am. Law Reg. (N. S.), 540. [So, as to a scenic railway with foundation of brick piers. Thompson Scenic Co. v. Young, 90 Md., 278, 282 (1899).]

Bowling alleys erected by a tenant, the floor of each alley laid on cleats placed on the floor and nailed thereto with shingle nails; battened partitions between the alleys, resting in grooves cut in blocks of wood nailed to the floor; temporary runs for the balls, and a temporary balcony, fastened to the building about as firmly as the alleys; *held*, to be removable as trade fixtures. Hanrahan v. O'Reilly, 102 Mass., 201 (1869). See, however, O'Brien v. Kusterer, 27 Mich., 289 (1873).

So, as to partitions and box-stalls in a saloon. Dingley v. Buffum, 57 Me., 381 (1869). [As to partitions, see Ward v. Earl, 86 Ill. App., 635 (1899); Bernheimer v. Adams, 70 App. Div., 114, 120 (N. Y., 1902); Smusch v. Kohn, 49 N. Y. Supp., 176 (1898); Podlech v. Phelan, 13 Utah, 333, 340 (1896); Hughes v. Towers, 16 Up. Can. C. P., 287 (1865); see, also, Hanson v. News Pub. Co., 97 Me., 99, 102 (1902); and Orr v. Davis, 17 N. Z., 106, 109 (1898), as to a glass screen.]

[So, as to an office, five by seven, and five feet high, a brass window fixture for displaying goods, and a mirror. Argles v. McMath, 26 Ont., 224, 248 (1895), aff'd 23 Ont. App., 44, 47 (1896).]

[So, as to a cold storage room, twelve by fourteen, and ten feet high, attached by strips and nails to the wall and floor; and an office attached to the wainscoting and to the ceiling by a quarter round. Ward v. Earl, 86 Ill. App., 635 (1899).]

[So, as to water-closets. Bernheimer v. Adams, 70 App. Div., 114, 120 (N. Y., 1902).]

So, as to an oyster and trench counter, and a bar in a saloon. Guthrie v. Jones, 108 Mass., 191 (1871). [As to counters, bars, bar-fixtures, sinks, connecting pipes, show-cases, see McCall v. Walter, 71 Ga., 287, 290 (1883); Berger v. Hoerner, 36 Ill. App., 360 (1889); Roth v. Collins, 109

Iowa, 501, 503 (1899); Carlin v. Ritter, 68 Md., 478, 493 (1888); Smusch v. Kohn, 49 N. Y. Supp., 176 (1898); Asheville Co. v. Southwick, 119 N. C., 611, 616 (1896); Kenney v. Matlock, 12 Atl., 589 (Pa., 1888); Podlech v. Phelan, 13 Utah, 333, 340 (1896); Laidlaw v. Taylor, 2 Nova S. L. R., 155 (1881); Cubbins v. Ayres, 72 Tenn., 329 (1880). See, also, Patterson v. Gallagher, 25 Ore., 227, 229 (1894).]

[So, as to a copying-press and a cheese-case. McCall v. Walter, 71 Ga., 287, 290 (1883).]

[So, as to tile flooring. Ross v. Campbell, 9 Colo. App., 38, 40 (1896).]

[So, as to temporary floors, scantling, presses, vats, and cocks. Hughes v. Towers, 16 Up. Can. C. P., 287 (1865). See, also, Crerar v. Daniels, 109 Ill. App., 654 (1903), as to planks on a dock.]

[So, as to a hanging crib or swinging floor attached by lag-screws to the joists overhead. Chase v. New York Insulated Wire Co., 57 Ill. App., 205 (1894).]

[So, as to a platform to be used for displaying goods, and nailed to the walls, and connected with the floor by stairs nailed at each end, said platform being incapable of removal without being taken apart, yet without injury to the building. Shapira v. Barney, 30 Minn., 59 (1882).]

[So, as to a board cupboard, pump and shedding, bath-tub, ice-chest, copper sink, and beer-rigging in hotel. Kenney v. Matlock, 12 Atl., 589 (Pa., 1888).]

So, a coal bin, walnut railing, stairs and balusters, a closet and walnut shelves in a store, may be removable as trade fixtures. Seeger v. Pettit, 77 Penn. St., 437 (1875).

So, as to the wooden awning erected by a butcher over the sidewalk adjoining the building, to keep the sun off from his vegetables and fruit stand. Devin v. Dougherty, 27 How. Pr., 455 (1864). [As to awnings and storm-house, see Carlin v. Ritter, 68 Md., 478, 493 (1888); Bernheimer v. Adams, 76 App. Div., 114, 120 (N. Y., 1902); Argles v. McMath, 26 Ont., 224, 228 (1895), aff'd 23 Ont. App., 44, 47 (1896).]

So, as to a vault, built on its own foundation, for banking uses within a building; also a safe therein, too large to be removed without tearing down the vault. Dostal v. McCadden, 35 Iowa, 318 (1872). [As to iron safes, see McCall v. Walter, 71 Ga., 287, 290 (1883); Rudd v. Anderson, 12 Ky. Law R., 489, 491 (1890); Cubbins v. Ayres, 72 Tenn., 329 (1880).]

[So, as to electric light apparatus, incandescent lamps, wire, switchboard, electrical instruments, dynamos and machinery. Ross v. Campbell, 9 Colo. App., 38, 40 (1896); Hewitt v. General Electric Co., 164 Ill., 420 (1897); 61 Ill. App., 168, 169 (1895); Brown v. Reno Power Co., 55 Fed., 229 (U. S. C. C., Nev., 1893); Liebe v. Nicolai, 30 Ore., 364, 375 (1897). See, also, Kansas Trust Co. v. Electric Power Co., 116 Fed., 904 (U. S. C. C., Mo., 1902), as to the feed-wire for an electric railway.]

[So, as to a sign-board of an inn, being a picture painted by a celebrated artist. *Ex parte* Sheen (1880), 15 Co. Ct. & Bankr. Cas., 39.]

[*92] *and they may be seized and severed on execution against him, as personalty during the term.[1] The right of removal in such cases is said to depend upon the mode in which the thing to be removed is annexed to the freehold, and the effect which its removal would have upon the premises. It may be exercised, in such a case, it is said, whenever it is not contrary to any prevailing usage, and causes no material injury to the estate, and

[So, as to a derrick in a stone-quarry. Honeyman v. Thomas, 25 Ore., 539 (1894).]

[So, as to a bridge over a zanja for giving access to a lumber-yard. Security Loan Co. v. Williamette Mills Co., 99 Cal., 636, 640 (1893).]

See, also, the cases hereinafter cited, in relation to the subjects of Executor and Heir, Tenant for Life and Remainderman, etc., Bankruptcy, etc.

[1] Poole's Case, 1 Salk., 368 (1703); s. c., Holt, 65; Lacey v. Giboney, 36 Mo., 320 (1868); Lemar v. Miles, 4 Watts, 330 (1835). [McCall v. Walter, 71 Ga., 287, 290 (1883); Ward v. Earl, 86 Ill. App., 635, 641 (1899); Gordon v. Miller, 28 Ind. App., 612, 617 (1901); Price v. Malott, 85 Ind., 266, 269 (1882); McCarthy v. Burnet, 84 Ind., 23, 27 (1882); Docking v. Frazell, 38 Kan., 420, 423 (1888); Hayford v. Wentworth, 97 Me., 347 (1903); Morrison v. Sohn, 90 Mo. App., 76 (1901); Bernheimer v. Adams, 70 App. Div., 114 (1902), aff'd 175 N. Y., 472 (1903); Townsend v. Underhill, 6 Pa. Co., 544, 545 (1889); Hughes v. Edisto Shingle Co., 51 S. C., 1, 30 (1897); Miller v. Muirhead (1894), 21 Sess. Cas., 4th Ser., 658, 660; Pronguey v. Gurney, 37 Up. Can. Q. B., 347, 355 (1875); Hughes v. Towers, 16 Up. Can. C. P., 287 (1865); see, also, Duffus v. Bangs, 122 N. Y., 423, 428 (1890), aff'g 50 Supr. Ct. (43 Hun), 52, 54 (1887); Metropolitan Concert Co. v. Sperry, 9 N. Y. St. R., 342, 343 (1887), aff'd 120 N. Y., 620 (1890); Keefe v. Furlong, 96 Wis., 219, 221 (1897). A chattel mortgage of trade fixtures "to be affixed" is valid as between the parties. Perry v. White, 111 N. C., 197 (1892).] See this subject further considered, with reference to the transfer of fixtures, and their liability to seizure on execution, &c. (*post*), p. *357. But where such fixtures are so permanently annexed as to become parcel of the realty, and irremovable by the tenant as against his landlord, he cannot, by selling or mortgaging, or otherwise dealing with them, as personalty, convey to another the right of removal as against his landlord. He can convey no greater right than he possesses himself. O'Brien v. Kusterer, 27 Mich., 289 (1873). See next note. [Griffin v. Ransdell, 71 Ind., 440, 443 (1880); Butler v. Colwell, 89 Ill. App., 133, 137 (1900); Leman v. Best, 30 Ill. App., 323, 325 (1888); Bonney v. Foss, 62 Me., 248, 252 (1873); Smith v. Park, 31 Minn., 70, 73 (1883); Rooney v. Stearns, 17 N. Y. Weekly Dig., 322 (1883); Burkhardt v. Hopple, 6 Ohio Dec., 127, 128 (1897); Menger v. Ward, 28 S. W., 821, 825 (Tex. Civ. App., 1894); Orr v. Davis, 17 N. Z., 106, 110 (1898); see, also, Allen v. Gates, 73 Vt.,

*where the thing can be removed without losing its essen- [*93] tial character or value as a personal chattel.[1]

On the other hand, however, there may be annexations made by a tenant occupying premises for trade purposes, of so intimate and permanent a character as to furnish satisfactory evidence that the annexations were intended to be permanent ac- *cessions to the realty, in which case they would, of course, [*94] be irremovable.[2]

Between these two extremes there are a variety of cases,

222, 229 (1900); Kendall Mfg. Co. v. Rundle, 78 Wis., 150 (1890); Davy v. Lewis, 18 Up. Can. Q. B., 21.]

[One cannot successfully assert title to a house situated upon the land of another by simply establishing a purchase from some third person. Griffin v. Ransdell, 71 Ind., 440, 442 (1880).]

[If trade fixtures are left in a building at the time the tenancy ceases, neither the tenant, nor a purchaser, nor a chattel mortgagee of such fixtures has the right to remove them. Fuller v. Brownell, 48 Neb., 145, 150 (1896); Sweet v. Myers, 3 S. Dak., 324, 330 (1892).]

[Where the Code gives a mechanics' lien upon the improvements made by a lessee, and provides for their removal, it extends only to such improvements as the lessee has a right to remove. Stenberg v. Liennemann, 20 Mont., 457 (1897).]

[A liquidator has no more power to remove things affixed to the soil than the tenant has. Pender v. Bathgate Oil Co., (1887) 24 Scot. Law Rep., 519, 520.]

[1] See Hanrahan v. O'Reilly, 102 Mass., 203 (1869). See, also, Wall v. Hinds, 4 Gray, 271 (1885); C. C. La., Art. 2697, quoted *post* in this chapter. [Honeyman v. Thomas, 25 Ore., 539, 542 (1894); Hackett v. Bennett, 12 N. S. W., Sup. Ct., 327, 332 (1874); see, also, Powell v. Bergner, 47 Ill. App., 33, 35 (1893); Roth v. Collins, 109 Iowa, 501, 503 (1899); Gulf &c., R'y Co. v. Dunman, 85 Tex., 176, 182 (1892); Sherrick v. Cotter, 28 Wash., 25 (1902). But see Updegraff v. Lesem, 15 Colo. App., 297, 305 (1900), where it is said that "it does not matter much how firmly the articles may be attached to the land."]

[2] In O'Brien v. Kusterer, 27 Mich., 289 (1873), a bar, bar-fixtures, cupboard, bowling-alley-ways and racks, put down by a tenant for years, and attached to the building and made a part of the realty, so far as mechanical annexation could make them so, the bowling-alleys connected with the floor and sleepers in a very substantial manner, were *held* to be permanent fixtures annexed to the freehold so as to belong to the landlord, and not to be removable by the tenant's vendees; and the tenant's sale of such fixtures as personality, and taking back a chattel mortgage upon them, could not invest him with any new right as against the landlord, unless he was shown in some satisfactory way to have waived or

relinquished his rights derived from such annexation, or assented to their being dealt with by the tenant as personalty or things removable. The particular manner of annexation not stated in the report, further than above. See, also, Talbot v. Whipple, 14 Allen, 177 (1867). [Holmes v. Standard Pub. Co., 55 Atl., 1107, 1108 (N. J. Ch., 1903); see, also, McCall v. Walter, 71 Ga., 287, 290 (1883); Landenberger v. Berges, 15 Phila., 96, 97 (1882); Kendall Mfg. Co. v. Rundle, 78 Wis., 150, 158 (1890).]

[Track, bridges, buildings, tanks, turn-tables, stationary engines, track-scales, etc., built by a corporation which had leased a railroad from the state, are not removable, whether substituted for former structures, or in addition thereto. Western & Atlantic R. R. Co. v. State, 14 L. R. A., 438, 451 (Ga. Spec. Com., 1891). See, also, as to engines and boilers, Kaestner v. Day, 65 Ill. App., 623, 630 (1895); Barker v. Cincinnati Brick Co., 4 Ohio Dec., 270, 271 (1896); and Brownell v. Fuller, 60 Neb., 558, 565 (1900). In the latter case a portable engine and boiler had been placed in an alley. In Hughes v. Towers, 16 Up. Can. C. P., 287 (1865), new parts had been added to an engine, and the old parts adapted thereto. As to a steam heating plant, substituted for a prior one, see Pond Co. v. O'Conner, 70 Minn., 266, 268 (1897).]

[A brick baker's oven is not removable. Collamore v. Gillis, 149 Mass., 578, 581 (1889); see, also, Gauggel v. Ainley, 83 Ill. App., 582 (1898), as to an oven and frame sheds.]

[So, as to an ice plant consisting of buildings, engines, boilers and machinery bolted to masonry. Menger v. Ward, 28 S. W., 821, 824 (Texas Civ. App., 1894).]

[So, as to a carriage-house, carving-room, cupboard, gas-pipes, registers, slates, iron sink, hall-floors, summer dining-room, store-room, hitching-posts, fence, double glass doors, tin spouting in a hotel. Kenney v. Matlack, 12 Atl., 589 (Pa., 1888).]

[So, as to cement flooring, in a cellar, stone steps, brass railing and the tiled walls and ceiling of an entrance leading thereto, partitions of wood, glass and cement, water-closets, urinals, wash-basins, sewers, iron columns supporting the floor, bar and counters imbedded in cement, refrigerators, and gas-pipe. Felcher v. McMillan, 103 Mich., 494, 498 (1894).]

[So, as to wainscoting, veneering, partitions and doors. Matthiesen v. Arata, 32 Ore., 342, 347 (1897).]

[So, as to a stairway. Bovet v. Holzgraft, 5 Tex. Civ. App., 141, 144 (1893).]

[See Bedlow v. New York Dock Co., 112 N. Y., 263, 282 (1889), as to a pier.]

[Fixtures which are substituted for or replace fixtures received by the tenant from his landlord, are not removable by him. *Ex parte* Hemenway, 2 Lowell, 496, 498 (U. S. Dist. Ct., Mass., 1876); Felcher v. McMillan, 103 Mich., 494, 499 (1894); Ashby v. Ashby, 59 N. J. Eq., 536 (1900); Hay v. Tillyer, 14 Atl., 18, 19 (N. J. Ch., 1888); Richardson v. Ranney, 2 Up. Can. C. P., 460.]

among which there exists some diversity and even contrariety of opinion. There can probably be no general rule laid down for the government of all cases, but each case should be decided on its own facts, as it arises,[2] the question being in all cases a mixed one of law and fact.[3] There have been, however, some general discussions on the subject, and some points decided that may furnish light towards the decision of future cases. In Whitehead v. Bennett,[4] per Kindersley, V. C., a distinction was *taken between ordinary trade fixtures and buildings built [*95] exclusively for trade, and it was held, in a question arising between landlord and tenant, that buildings erected solely for purposes of trade, viz.: a bleaching-house, a dye-house, an engine-house, a lime-house, and a building erected upon cross beams resting upon two walls and forming a passage, said buildings being built of brick, with brick foundations let into the soil, and incapable of removal in an integral condition, could not be removed by the tenant, though it was admitted that things in the nature of machinery, engines, or plant, or things substantial and solid, such as vats and utensils, to which the buildings were in some sense accessory, were clearly removable as between landlord and tenant. The question was said to turn upon the

[2] See Brennan v. Whitaker, 15 Ohio St., 451 (1864); Steward v. Lombe, 1 B. & B., 506 (1820). [Thomas v. Wagner, 131 Mich., 601, 603 (1902).]

[Until there is evidence tending to prove the several elements by which the ownership of fixtures would be in the tenant, he has no right to require the court to leave that question to the jury. Leman v. Best, 30 Ill. App., 323, 326 (1888).]

[Where the written lease is silent, parol evidence is admissible tending to show what was the final disposition to be made of the improvements. Hammond v. Martin, 15 Tex. Civ. App., 570, 573 (1897).]

[Real evidence as to the manner of annexation, that is, viewing the premises, is more satisfactory than oral evidence in reference thereto. Gauggel v. Ainley, 83 Ill. App., 582, 587 (1898).]

[3] See Steward v. Lombe, 1 B. & B., 506 (1820); Trustees v. Grubb, 19 Leg. Int., 157; 5 Phila. R., 41 (1862); Grand Lodge v. Knox, 27 Mo., 315 (1858); Fortman v. Goepper, 14 Ohio St., 562 (1863); Campbell v. O'Neill, 64 Pa. St., 290 (1870). [Straight v. Mahoney, 16 Pa. Super., 155, 158 (1901); Pronguey v. Gurney, 36 Up. Can. Q. B., 53, 77 (1874); see, also, *ante*, p. *24.]

[A building erected by a tenant for purposes of trade is *prima facie* a trade fixture. Gray v. McLennon, 3 Man., 337 (1886).]

[4] 27 L. J. (N. S.), Ch., 474 (1858); s. c., 6. W. R., 351.

nature of these particular buildings as to being capable of being removed in an integral condition; and the rule was laid down that trade fixtures, to be removable, must be either capable of being removed bodily, or taken to pieces and put up again, so as to be identically what they were before. The case of the building was stated to be that of the removal of materials simply, while the other case stated (that of an engine), was that of taking to pieces and restoring to their former state.[1]

However, on the other hand it was held in Van Ness v. Pacard,[2] that a wooden building two stories high in front, with a shed of one story and a cellar of stone or brick, the principal building resting upon this stone or brick foundation, and having a brick chimney, erected by a tenant for years, who was a carpenter by trade, with a view to carrying on the business of a dairyman and for the residence of his family and servants engaged in his said business, in which [*96] *house he also carried on carpenter work, was a trade fixture which might be pulled down and removed by the tenant. In delivering the opinion of the court, Story, J., observed that "the question, whether removable or not, does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high, or has a brick or other chimney. The sole question is whether it is designed for purposes of trade or not. A tenant may erect a large as

[1] The following cases were cited: Elwes v. Maw, 3 East, 38 (1802); Poole's Case, 1 Salk., 368 (1703); Lawton v. Lawton, 3 Atk., 13 (1743); Dudley v. Warde, Ambl., 113 (1751); Penton v. Robart, 2 East, 88 (1801); s. c., 4 Esp., 33. In Whitehead v. Bennett (*supra*), the *dicta* of Lord Ellenborough in Elwes v. Maw (*supra*), were explained as referring only to the particular case there in question. See, also, Ferard Fixt., 48; 2 Smith Lead. Cas. (7th Am. ed.), 258; Kutter v. Smith, 2 Wall., 491, 497 (1864); Haflick v. Stober, 11 Ohio St., 482 (1860); Reid v. Kirk, 12 Rich. Law, 54 (1859); Cannon v. Hare, 1 Tenn. Ch., 22, 35 (1872).

[A four story building resting upon mud-sills imbedded in the land, would not, in the absence of agreement, be removable. West Coast Lumber Co. v. Apfield, 86 Cal., 335 (1890).]

[A substantial one story frame building twenty-three by forty-five feet, was built upon sills eight by ten inches nailed to twenty-four posts in three rows let into the ground two and one-half to three feet, and ten inches in diameter. *Held*, not a trade fixture. Burkhardt v. Hopple, 6 Ohio Dec., 127, 130 (1897).]

[2] 2 Pet., 137 (1829).

well as a small messuage, or a soap boilery of one or two stories high, and on whatever foundations he may choose."[3]

On the whole, the tendency of modern authority, at least in the United States, is believed to be adverse to the rule laid down in Whitehead v. Bennett (*supra*), that trade fixtures (or at least trade fixtures in the nature of buildings) to be removable must either be capable of being bodily removed, or taken in pieces, and put up again, so as to be identically what they were before such removal.[4] Perhaps, however, on the other

[3] The remainder of the quotation is as follows: "In Lawton v. Lawton, 3 Atk. R., 13, Lord Hardwicke said * * * that it made no difference whether the shed of the engine be made of brick or stone. In Penton v. Robart, 2 East's R., 88, the building had a brick foundation let into the ground, with a chimney belonging to it, upon which there was a superstructure of wood. Yet the court thought the building removable. In Elwes v. Maw, 3 East's R., 37, Lord Ellenborough expressly stated, that there was no difference between the building covering any fixed engine, utensils, and the latter. The only point is, whether it is accessory to carrying on the trade or not. If *bona fide* intended for this purpose, it falls within the exception in favor of trade. The case of the Dutch barns, before Lord Kenyon [Dean v. Allalley, 3 Esp., 11; Woodfall's Land. and Ten. 219], is to the same effect." The rule laid down in Van Ness v. Pacard, was quoted approvingly in Cromie v. Hoover, 40 Ind., 49, 56 (1872), with reference to buildings erected for storing ice, to be sold as merchandise; also in White v. Arndt, 1 Whart., 94 (1835); Lamphere v. Lowe, 3 Neb., 136 (1873). See, also, Powell v. McAshan, 28 Mo., 71 (1859); Kutter v. Smith, 2 Wall., 495 (1864). [See Wiggins Ferry Co. v. Ohio & Miss. R'y Co., 142 U. S., 396, 416 (1892); Kuhlman v. Meier, 7 Mo. App., 260 (1879); Sampson v. Camperdown Mills, 64 Fed., 939, 942 (U. S. C. C., S. C., 1894).]

[4] See *dicta* in Penton v. Robart, 2 East, 88 (1801); Elwes v. Maw, 3 East, 38 (1802); White v. Arndt, 1 Whart., 94 (1835); 1 Wash. Real. Prop., 114. [Ward v. Earl, 86 Ill. App., 635, 641 (1899); Wittenmeyer v. Board of Education, 10 Ohio Circ. Ct., 119, 122 (1895).]

[The fact that a removal requires the taking to pieces of a fixture, is not conclusive against the tenant's rights. "The landlord is not affected by an injury done by the tenant to the latter's own property. It may still be valuable to the tenant. * * * * * Identity is not necessarily lost by demolition." Baker v. McClurg, 96 Ill. App., 165, 173 (1901), aff'd 198 Ill., 28 (1902).]

In *Ex parte* Bentley, 2 M. D. & De G., 591 (1842); s. c., 6 Jur., 719, coke-ovens constructed of iron and brick-work, deeply sunk in the earth, and not removable without excavating it, were admitted to be trade fixtures.

In Moore v. Wood, 12 Abb. Pr., 393 (1860), a brick chimney sunk three feet into the ground for a foundation, and which could not be removed without being taken down, was held to be removable by the tenant on his being dispossessed of the premises for non-payment of the rent.

In Dostal v. McCaddon, 35 Iowa, 318 (1872), a vault built for banking uses within a building on its own foundations, within which was placed while being built, a safe too large to be removed without tearing down the vault, was, together with the safe, conceded by counsel for both parties and by the court to be a trade fixture. [See Commissioners of Pitkin County v. Brown, 2 Colo. App., 473, 475 (1892).]

In Lawton v. Lawton, 3 Atk., 13 (1743); and Dudley v. Warde, 1 Ambl., 113 (1751), engine-houses, whether made of brick or wood, intended to cover and being accessory to the engines of a colliery, were considered removable as between executor of tenant for life or in tail, and the remainderman or reversioner. See, also, Davis v. Moss, 38 Pa. St., 346 (1861); White's Appeal, 10 Pa. St., 252 (1849), where the question related also to the stone foundations for engine and boilers erected by a tenant for years.

In Penton v. Robart (*supra*), a wooden varnish-house set upon a brick foundation let into the ground with a chimney belonging to it, was allowed to be pulled down by the tenant, and the materials removed.

A wooden ice house, of a capacity of 2,000 tons and upwards of ice, built upon leased land for the storage of ice for sale in the business of the tenant, with no stone or other foundation under the sills, except a wooden block under each corner, the sills being set into the ground upon a layer of charcoal, at depths of from six inches to three feet, and banked up with soil on the outside to prevent the circulation of air under them, is a tenant's fixture, and may be pulled down and removed. Antoni v. Belknap, 102 Mass., 193 (1869). See, also, Cromie v. Hoover, 40 Ind., 49, 56 (1872). [Handforth v. Jackson, 150 Mass., 149 (1889).]

A building described as a "shed, stable, store-room and barn," being a wooden frame building on a side hill, with a basement; the foundation at the ends, a high stone wall laid in mortar, and the front of the basement being frame work, the frame work of the building extending down into the basement, and the building not being capable of being removed without being taken down, the purpose and use of the building not distinctly appearing, unless it might be inferred that it was used in connection with the tavern mentioned below, such building having been erected by the tenant, a tavern keeper, was considered to be removable as a trade fixture, if used by the tenant in connection with the tavern. Dubois v. Kelly, 10 Barb., 496 (1851).

See, also (6 Law Mag., 96), opinion of Sir John Richardson, that brick kilns constructed chiefly of brick and resting upon the ground, and sheds of brick covered with tiles, open at the sides, and for the most part resting upon brick pillars, erected by a tenant from year to year to make brick on the demised premises, are removable as trade fixtures.

[A brick building thirty-two by one hundred and twenty-five feet, a

*hand, the rule stated in Van Ness v. Pacard, that the sole [*97] question is, whether designed for purposes of trade or not, may not in all cases be strictly correct, as an annexation made by a tenant for purposes of trade may possibly be so constructed as *to furnish satisfactory evidence that the annexation was [*98] intended to be permanent, and as an accession to the realty. But if the annexation is made solely for purposes of trade, and is not intended to be made a permanent accession to the realty, of which fact the relation of landlord and tenant existing between the parties, and the fact that it is annexed for trade purposes only, would ordinarily seem to be satisfactory evidence, then it would seem to be the better opinion, that the right of removal is preserved. However, the mode of annexation, and the extent to which united, whether capable of being taken down and removed *integre, salve et commode,* without substantial injury to the realty or itself, seem all to be important considerations in determining this question of intention, no one test alone being sufficient to determine all cases.[1]

one hundred horse power engine and machinery used in manufacturing paper were held to be trade fixtures and removable by the tenant, in Belvin v. Raleigh Paper Co., 123 N. C., 138, 144.]

[A three story brick flouring-mill upon a stone foundation imbedded in the soil, was, in Gordon v. Miller, 28 Ind. App., 612, 617 (1901), said to be a trade fixture as between the tenant and a chattel mortgagee.]

[A brick railroad station, forty-five by one hundred feet, is a trade fixture. Carr v. Georgia R. R., 74 Ga., 73, 81 (1884). See Western N. C. R. R. v. Deal, 90 N. C., 110, 112 (1884).]

[A warehouse is a trade fixture. Evans v. McLucas, 15 S. C., 67, 70 (1880). See, also, Walton v. Wray, 54 Iowa, 531, 534 (1880).]

[In Brown v. Reno Power Co., 55 Fed., 229 (U. S. C. C., Nev., 1893), buildings upon solid stone foundations, containing dynamos and an engine and boiler, were held to be trade fixtures.]

[A bunk house and boarding house at a mine are trade fixtures. Couch v. Welsh, 24 Utah, 36, 47 (1901).]

[That where erections are required to be substantial in order to be useful, the fact that they are very substantially built has no weight, see Conrad v. Saginaw Min. Co., 54 Mich., 249, 254 (1884).]

[1] See Wall v. Hinds, 4 Gray, 271 (1885); Talbot v. Whipple, 14 Allen, 177 (1867). Where the trade fixture is of such a nature, and so annexed that it cannot be removed without being entirely or substantially destroyed, or receiving very serious injury—this fact would seem to furnish evidence nearly, if not quite, conclusive of an intention to dedicate it to the realty. See Teaff v. Hewitt, 1 Ohio St., 534 (1853). But with the

[*99] *It seems clear, however, that buildings moved or erected upon demised premises by a tenant for years principally for the purpose of trade, or business in the nature of trade, and capable of removal in an integral condition, may be removed, by such tenant, as trade fixtures.[2]

case of buildings for trade purposes, whose materials would be valuable for other purposes, the case seems different, and a distinction in this respect should be made between them. This subject has, however, been very little discussed by the courts.

Perhaps it may be said that the main question is one as to the intention with which the annexation was made, and that the various circumstances above mentioned are principally valuable as evidence of such intention. In Talbot v. Whipple (*supra*), a wooden building of large dimensions used as a dry-house, so constructed that it could not be removed from the premises without a change in its structure at great cost, built on stone foundation, partly natural and partly artificial, to which it was fastened by iron bolts, and having a brick furnace and chimney resting on a base in the ground; also, a machine called a calender, weighing about six tons, placed upon a solid foundation of stone and mortar in the cellar of the building, and extending into the second story, with the first floor fitted closely around the bottom of its frame, and braced and bolted to various parts of the building, and which could not be removed without being taken to pieces, taking up the floor, and cutting into the walls and side of the building, were regarded by the court, not as movable chattels, but as belonging to that class of fixtures which, if removable at all (which was not decided, though it seems to have been intimated that they were not removable), must be removed by the tenant during the term, and if suffered to remain thereafter belong to the landlord as a part of the freehold.

[See Holmes v. Standard Pub. Co., 55 Atl., 1107, 1108 (N. J. Ch., 1903).]

[A tenant is presumed not to intend to permanently enhance the value of another's estate by buildings and fixtures which could be removed during his term without injury. Cullers v. James, 66 Tex., 494, 498 (1886).]

[An oven which cannot be severed without being reduced to a mere mass of crude materials, is not removable. Collamore v. Gillis, 149 Mass., 578 (1889).]

[2] See the authorities hereinbefore cited in this chapter; also, Holmes v. Tremper, 20 John., 29 (1822), holding a cider mill, erected by a tenant, to be removable as against the landlord. [See Security Loan Co. v. Williamette Mills Co., 99 Cal., 636, 640 (1893); Howe's Cave Ass'n v. Houck, 73 Supr. Ct. (66 Hun), 205 (N. Y., 1892); Meader v. Brown, 5 N. Y. St. Rep., 839, 840 (1886); *Re* City of Buffalo, 1 N. Y. St. Rep., 742, 748 (1886); Lewis v. Ocean Pier Co., 125 N. Y., 341, 346 (1891).]

Respecting the injury done to the premises by the removal of fixtures, it has been laid down that the premises must be in as good plight and condition after the removal as they were

So, where a tenant of a hotel erected a ball room thirty by sixty feet, and one story high, not attached to any other building, but having its sills resting on stone pillars sunk in the ground from one to two feet, but in no manner attached thereto except by the weight of the building, the mode of annexation evincing no design of attaching it permanently to the freehold, *held,* to be a trade fixture removable by the tenant, and that the right of removal passed to the vendee on a sale to enforce a mechanics' lien. Ombony v. Jones, 19 N. Y., 234 (1859); affirming s. c., 21 Barb., 520. See, also, Lanphere v. Lowe, 3 Neb., 131 (1873); Doty v. Gorham, 5 Pick., 487 (1827); Cannon v. Hare, 1 Tenn. Ch., 22, 36 (1872); Beers v. St. John, 16 Conn., 322 (1844); Dean v. Allalley, 3 Esp., 11 (1799). [See Firth v. Rowe, 53 N. J. Eq., 520, 524 (1895).]

[A building resting upon planks laid upon the ground, sided with rough siding, and covered with a tin roof, rudely constructed at a cost of one hundred and fifty dollars, and used by a tenant for storing implements which he was engaged in selling, is a trade fixture. Sagar v. Eckert, 3 Ill. App., 412 (1879).]

[A wooden building twenty feet square, upon mud-sills resting upon short posts, is a trade fixture. Macdonough v. Starbird, 105 Cal., 15 (1894).]

[A boiler house, and cheap dwellings, some upon dry stone walls and some upon posts, erected for the exclusive purpose of carrying on mining operations, and removable without material disturbance of the land, are trade fixtures. Conrad v. Saginaw Min. Co., 54 Mich., 249 (1884).]

[A building fifteen by thirty, costing seven hundred dollars, and resting upon stone posts sunk into the ground, is a fixture which the tenant has a right to remove. McIver v. Estabrook, 134 Mass., 550 (1883).]

Where a tenant for years takes down an old and ruinous shop on the demised premises, and erects a new one for the same purpose, covering its foundation and extending beyond it, the use by the tenant of a portion of the materials of the old shop on the premises in the construction of the new one, will not, in law, vest the title of the latter in the owner of the former, if such new building is a different and distinct one from the old shop, and not the old one repaired or reconstructed. The title to the new shop thus turns on the question, whether it is substantially and essentially the same shop as the old one. Beers v. St. John (*supra*). See Smith v. Render, 27 L. J. Ex., 83 (1857).

[A tenant, without permission, removed a shed at the rear end of a building, to some other property of the landlord, and erected an addition in its place. The addition was built on piles driven into the ground, and annexed to the original building by nails. It was thirty by thirty-two feet, two stories high, and, when detached, left the end of the original building and of itself exposed to the weather. The original

before annexation.[3] While it is, doubtless, true that in the exercise of the right of removal, the tenant must do as little damage as possible, and that for any unnecessary damage[4] he

building and the addition were used together as a hardware store. *Held*, not a trade fixture. Fortescue v. Bowler, 55 N. J. Eq., 741, 742 (1897).]

[An addition erected by a tenant for a blacksmith's forge, a part of the wall of the old shop being torn down, is not a trade fixture. Weller v. Everitt, 25 Vict., 683 (1900).]

[3] See Tayl. Land. & Ten., § 550; Whiting v. Brastow, 4 Pick., 311 (1826). See, also, Seeger v. Pettit, 77 Pa. St., 437, 441 (1875), per Paxson, J.; Ferard Fixt., *46, 88. [Leman v. Best, 30 Ill. App., 323, 325 (1888); Ambs v. Hill, 10 Mo. App., 108, 109 (1881), 13 Mo. App., 585.]

[In Schaefer-Meyer Brew. Co. v. Meyer, 19 Ky. Law Rep., 411, 412 (1897), a mechanics' lien was allowed for a recess front made of oak wood and chipped glass, the old front to be replaced by the lienor, in the condition in which it was when the tenant took possession.]

[Where a building is erected in accordance with plans submitted to lessees, and by them approved as suitable for use as a bakery, but the only material difference of construction is that openings are left in the floors for the erection of ovens, such ovens when built by the lessees are not such an adaptation to the purpose of the realty as to make them a part thereof, if their removal will not injure the building, but only leave the original openings in the floors which, when filled in, would leave the building adapted for any of the ordinary uses of buildings of its general character. Baker v. McClurg, 96 Ill. App., 165 (1901), aff'd 198 Ill., 28 (1902).]

["The damage to the wall and its effect on the question of fixtures is got over, it is said, because the defendant rebuilt the wall after he had pulled down his addition to the shop. That action cannot affect the principle, which is one which must apply to everyone. In this case the defendant had the means to repair the damage done to the plaintiff's house, and rebuild the wall, but this principle must apply to all persons whether they have the means to repair or not. A man in poor circumstances might have been unable to afford such repairs, and his case must depend upon the same principle of law as the case of a man who can afford to make the repairs." Weller v. Everitt, 25 Vict., 683, 686 (1900).]

[The character of fixtures is not changed by the fact that by reason of their size it was not necessary to paint and finish the wall behind them. Kimball v. Grand Lodge of Masons, 131 Mass., 59, 63 (1881).]

[Where holes are made in brick walls twenty inches thick to receive the ends of a structure erected by a tenant, the court is not bound to consider nicely whether the walls remain "as strong as ever," where it appears that the removal of the structures would not leave the building in as good condition as it was before it was constructed. Chase v. New York Insulated Wire Co., 57 Ill. App., 205, 210 (1894).]

[4] See Hare v. Horton, 5 B. & Ad., 715 (1833).

would be liable in an action, yet, as was observed by Campbell, C. J., in Martin v. Roe,[5] "in all cases of this kind, injury to the *freehold must be spoken of with less than literal strict- [*100] ness. A screw or a nail can scarcely be drawn without some attrition; and when all the harm done is that which is unavoidable to the mortar laid on the brick walls [the articles in question in this case being hot-houses of frame and glass-work, resting on and imbedded in mortar on brick walls], this is so trifling that the law, which is reasonable, will regard it as none. Upon any other principle, the criterion of injury to the freehold would be idle." In Lawton v. Lawton,[1] Lord Hardwick observed that it was very true, in general, that you shall not destroy the principal thing by taking away the accessary to it; but he considered the walls, in this instance, as not the principal thing, they being only sheds to prevent any injury to it, the engine. And in Dudley v. Warde,[2] where the same objection was made, he made the same answer, observing that here the engine was the principal, and therefore it was like the case of coppers, etc.; you cannot take them away without spoiling the walls; yet as they are the principal, and the building is only the better to enable the use of them, they may be removed. The case of Foley v. Addenbroke,[3] lays down a very reasonable rule on this subject. There were in this case, on the part of the lessee, covenants in the lease to repair, and to yield up in repair, certain enumerated things, certain things therein also enumerated

[5] 7 Ell. & Bl., 237, 244 (1857). See, also, Ferard Fixt., 89; Avery v. Cheslyn, 3 Ad. & E., 75 (1735), where the question was left to the jury, whether the fixed cornice could be removed without doing substantial injury to the house. [Cubbins v. Ayres, 72 Tenn., 329, 332 (1880); Pronguey v. Gurney, 36 Up. Can. Q. B., 53, 78 (1874); see, also, Bernheimer v. Adams, 70 App. Div., 114 (1902), aff'd 175 N. Y., 472 (1903).]

[In Ward v. Earl, 86 Ill. App., 635 (1899), the fact that the floor and ceiling are slightly damaged by the removal of fixtures, was considered immaterial.]

[In Schaefer-Meyer Brewing Co. v. Meyer, 19 Ky. Law Rep., 411, 412 (1897), it was held that where the lessee had a recess front of oak and glass put in, it was removable "without material injury" under the statute, if the original front was replaced.]

[1] 3 Atk., 13 (1743).

[2] Ambl., 113 (1751).

[3] 13 M. & W., 174 (1844); s. c., 14 L. J. Exch., 169.

being excepted from the operation of the covenant and which the lessee (upon the lessor's neglecting to purchase said articles, after giving a certain notice, which he had an option to do) had a right to remove. One of the breaches assigned was, that the defendant did not repair, nor leave in repair at the end of the lease, but on the contrary, part of the furnaces, etc., being other than the iron-work, etc. (the things excepted in the covenant), was by the defendant wrongfully pulled down and removed, and the furnaces, etc., being other than the iron-work, etc., were suffered to be and continue, and at the expiration of [*101] the *lease were left in bad order and condition for want of repair. To this breach the defendant pleaded, among other things, first, a special traverse of the breach, and averred performance according to the covenant. Secondly, that the said matters and things in that breach complained of were, and each and every part thereof was done and occasioned under, by virtue, and in an execution of the said powers, rights, etc., granted and reserved to the defendant in and by the lease. The plaintiff joined issue on the first plea, and replied to the second, denying that the things alleged in the breach were done, or occasioned under or by virtue, or in execution of the powers, rights, etc., granted and reserved to the defendant by the said lease. The injury complained of being caused by the exercise of the right of removal in accordance with the above provisions, there seems in this respect no valid distinction between this case and a case arising under the exercise of the ordinary right of removal, and the observations of the court seem equally applicable to both cases. The court held, that in removing certain machinery and apparatus fixed in brick-work (as boilers, boiler-grates, iron-work and castings of engine, etc.), and which the lessee had a right under the lease to remove, with respect to damage to such brick-work, which constituted a considerable portion of the claim made by the plaintiff, the defendant was not bound to restore the brick-work in a perfect state, as if the article that it was intended to protect, or support, or cover, was there. It was sufficient for the defendant to exercise his right to remove what the lease gave him authority to remove, and in doing so, to remove the brick-work, and to leave it in such a state as would be most useful and beneficial to the lessors, or those who might next take the premises. As to the

manner in which such right of removal was to be exercised, the court observed, that the only rule they could lay down was, that the lessee had a right to remove the articles, doing as little damage as possible, and leaving the premises in a state fit to be used for a similar purpose by another tenant. But that if any unnecessary and wanton damage[1] was done, and the premises left in such a state as not to be conveniently applicable to the same purpose, *to that extent the plaintiff would be [*102] entitled to recover damages.

In determining what is a trade, within the meaning of the rule in question, the word is not used in a strict and literal signification, but in a very liberal sense; and has been extended to include various occupations having an affinity or resemblance to trade, though hardly included in the usual definitions of that term. Thus, the keeper of an inn or hotel, in some sense, exercises a trade; and a building erected by him on the demised premises for use by him in his business, as a ball room, has been held to be a trade fixture.[2]

[1] See Hare v. Horton, 5 B. & Ad., 715 (1833).

[2] Ombony v. Jones, 19 N. Y., 234 (1859); affirming s. c., 21 Barb., 520. See, also, Dubois v. Kelly, 10 Barb., 496 (1851); Wall v. Hinds, 4 Gray, 256 (1855); Van Ness v. Pacard, 2 Pet., 137 (1829); Cannon v. Hare, 1 Tenn. Ch., 22 (1872), and the cases hereinbefore and hereinafter cited in this chapter, with reference to mixed cases, agricultural fixtures, nurserymen, etc. In Cannon v. Hare (*supra*), it is said that "it is probable, also, that the exception in favor of buildings erected for purposes of trade, will be limited in the case of tenant for life to such as are erected exclusively for purposes of trade proper, and will not be extended to occupations having an affinity or resemblance to trade. In the absence of authority, however, this can only be considered as a suggestion."

[The hotel business is a trade. Gray v. McLennan, 3 Man., 337 (1886); mining is a trade. Updegraff v. Lesem, 15 Colo. App., 297, 306 (1900); Springfield Co. v. Cole, 130 Mo., 1, 7 (1895). That operating oil and gas wells is a trade, see Siler v. Globe Glass Co., 21 Ohio C. C., 284, 286 (1900).]

[Whether the proprietor of a skating-rink is engaged in trade, *quaere*. Howell v. Listonville Rink Co., 13 Ont., 476, 491 (1886).]

["We see no distinction in principle between the right to remove a building erected by a lessee for school purposes, and one erected by a lessee for the purpose of trade or other business." Wittenmeyer v. Board of Education, 10 Ohio C. C., 119, 124 (1895).]

[Operating a railroad leased from a state is not a trade. Western & Atlantic R. R. Co. v. State, 14 L. R. A., 438, 451 (Ga. Spec. Com., 1891).]

In some cases, however, where the calling is exercised solely with reference to agricultural operations, or as a means of enjoying the benefit of the inheritance, an exception has been made, the exercise of such calling not being considered a trade within the meaning of the rule. There does not seem, however, to be any valid reason for this exception; and, as will be shown hereafter, the tendency of modern judicial opinion in the United States seems opposed to such distinction.[3]

[*103] *Besides the cases of erections made upon the demised premises by tenants solely for ordinary trade purposes, unconnected with and independent of the land demised, some instances of which have been hereinbefore given, it sometimes happens that the erection in question is not made exclusively for trade purposes, but in part in relation to trade, and in part for purposes unconnected with trade, constituting what have usually been called mixed cases.

[3] This subject is well considered in the valuable work of Mr. Ferard, on page 60, in his learned criticism of the case of Elwes v. Maw, 3 East, 38 (1802), from which we quote as follows: "But the rule laid down in the case of Elwes v. Maw, appears liable to further objection, on account of the narrow grounds upon which it rests. It is universally allowed that the privilege in respect of trade is not confined to trade, according to the strict meaning and construction of the statutes of bankruptcy. It is not a trading, within these statutes, to work a coal mine [Wils., 169; 7 East, 447. See Stat. 6 G. IV., c. 16]; nor for an occupier of land to manufacture cider from his own fruit for sale [Id. ib., and see 1 T. R., 38, per Lord Mansfield]; nor to manufacture salt for sale from springs on the demised premises, [*Ex parte* Atkinson, 1 M. D. & D., 300. See, also, 9 B. & C., 577, 590; Paul v. Dowling, 1 M. & M., 267. But by the late statute, 5 & 6 Vict., ch. 122, sec. 10, brickmakers, lime-burners, millers, etc., are now deemed traders within the bankrupt laws. So, market gardeners.] Yet these and similar occupations are held to entitle a tenant to remove utensils and erections as trade fixtures. [See, also, 2 East, 91; 7 Taunt., 191]; and it would seem that many branches of husbandry have a strong affinity to trade in this enlarged sense of the expression; for instance: the dealings of a farmer in stock, wool and bark, etc., the making of charcoal, growing and preparing flax, or the manufacturing of hoops, which, in some of the counties of England is a considerable source of the profits of a farm. In this view of the subject, the making of cheese on a farm, or the preparing of grain for market by means of a threshing-machine, may with equal reason be considered a manufacture or a species of trade, as the making of cider from the produce of an orchard annually renewing." See the subject further considered (*post*), under the head, Agricultural Fixtures.

The cases usually referred to in this connection, are those where the trade is connected with the enjoyment of the profits of the demised land,[4] though there are also cases of mixed trade and domestic fixtures, etc., which will be hereafter referred to. In Lawton v. Lawton,[5] where the question was whether a fire engine set up for the benefit of a colliery by a tenant for life, should be considered as personal estate, and go to his executor, or fixed to the freehold and go to the remainderman, Lord Hardwicke, in deciding such engine to be personal estate, observed that one reason that weighed with him was, its being a mixed case between enjoying the profits of the land, and carrying on a species of trade; and that, considering it in this light, it came very near the instances in brew-houses, etc., of *furnaces and coppers. He observed also, that the case [*104] of the cider-mill between the executor and the heir, referred to by counsel as having been decided by Lord Chief Baron Comyns at the assizes at Worcester, was extremely strong; for though cider is a part of the profits of the real estate, yet it was held in said case that the cider-mill was personal estate, notwithstanding, and that it should go to the executor.[6] So in Dudley v.

[4] Where the tenant's calling is exercised upon material obtained elsewhere than from the demised land, as were the chalk and coals brought from a distance to be prepared for the market upon the demised land by the lime-burner in Thresher v. East London Water Works, 6 B. & C., 608 (1824), the question here considered does not arise.

[5] 3 Atk., 13 (1743).

[6] This case is not reported, but was cited by counsel in Lawton v. Lawton (*supra*); and the cider-mill in question was stated to have been let in very deep into the ground; and yet it was said Lord Chief Baron Comyns, upon an action of trover brought by the executor against the heir, was of opinion that it was personal estate, and directed the jury to find for the executor. The case was said, however, by Lord Mansfield, in Lawton v. Salmon (or Lawton), 3 Atk., 16, note (1782), most probably to have turned upon a custom. See, s. c., 1 H. Bl., 259, note. See, also, Holmes v. Tremper, 20 John., 29 (1822), where a cider-mill and press erected by a tenant from year to year at his own expense, and for his own use in making cider on the farm, were held to be personal property belonging to the tenant, who might remove them at the expiration of his tenancy; and whether the mill was let into the ground or not was regarded as immaterial. The correctness of the cider-mill case decided by Comyns, C. B., as between executor and heir, has, however, been doubted. See the subject considered, *post*, in the chapter considering that

Warde,[7] which was very similar in its facts to Lawton v. Lawton, above cited, a similar decision was made, Lord Hardwicke observing that the determinations had been from consideration of the benefit of trade, and that a colliery was not only an enjoyment of the estate, but in part carrying on a trade.[8]

[*105] *Other and more modern decisions have followed the principle of Lawton v. Lawton, and Dudley v. Warde; and, as between landlord and tenant, and executor of tenant for life or in tail and remainderman and reversioner, the doctrine laid down by those cases seems well settled.[9] A variety of other

relation; also, Fisher v. Dixon, 12 Cl. & Fin., 312, 325, 329, 331 (1845); S. C., 9 Jur., 883; Wadleigh v. Janvrin, 41 N. H., 515 (1860). And the case of Holmes v. Tremper, so far as it lays down the doctrine that the tenant could remove the mill if annexed to the soil, after the end of the term, subject to an action of damages for breaking the close, the property in the mill not being lost by leaving it annexed after the end of the term, seems clearly erroneous. See the subject considered (*post*) in this chapter. Both decisions, however, would doubtless be considered correct, so far as relates to the question of the right of removal of such a structure, as between landlord and tenant, during the term.

[7] 1 Ambl., 113 (1751).

[8] It is to be observed that what, as between landlord and tenant, or executor of tenant for life, or in tail and reversioner or remainderman, would be considered as accessory to a trade, would not, under some circumstances, and as between other parties, *e. g.*, executor and heir, be so considered, but would be considered as an accessory to, and the means of enjoying the inheritance. Thus, in Lawton v. Salmon, 1 H. Bl., 259, note (1782); S. C., 3 Atk., 16, note, salt-pans placed by a testator in salt-works for the purpose of utilizing salt springs, the pans being made of hammered iron riveted together, and fixed with mortar to a brick floor, were considered by Lord Mansfield not as accessory to the carrying on a trade, but as accessories necessary to the enjoyment and use of the principal, the inheritance, though, as observed by Lord Mansfield, "it would have been a different question if the springs had been let, and the tenant had been at the expense of erecting these salt works." See, also, remarks of Ellenborough, C. J., in Elwes v. Maw, 3 East, 38 (1802); Mansfield v. Blackburne, 6 Bing. N. C., 426 (1840), and the chapter considering the relation of executor and heir (*post.*)

[9] Thus, a steam engine and pump, used for the purpose of working a quartz ledge in the getting out of gold, the engine fastened to a frame of timber, bolted and spiked to timbers bedded in the ground sufficiently to make them level, the pumps extending into the shaft and stayed by rods reaching to the rafters of the shed constructed over the machinery merely for its shelter, were held to be removable as trade fixtures. Merritt

examples has been suggested by writers on this subject, as, for instance, machines and erections made and used by a tenant for procuring or preparing minerals, lime, alum, pottery, brick, etc.;[10] also mixed cases, wherein agriculture is combined with a species of trade, as the raising of grain for the purpose of converting it into malt in his own kilns, for sale, or grinding it into flour, for sale by the tenant in his occupation as a miller; so a distiller might grow his own grain, etc.[11] So a machine, uten*sil or building, may be built in part for trade, and [*106] in part for domestic purposes; or it may be sometimes employed for purposes of trade, and at other times for purposes entirely unconnected therewith. In Van Ness v. Pacard[12] a building was erected by a tenant for years, a carpenter by trade, with a view to carry on the business of a dairyman, and for the residence of his family and servants engaged in that business. He also carried on the business of a carpenter in the house. Story, J., delivering the opinion of the court, observed that "if the house were built principally for a dwelling house for the family, independently of carrying on the trade, then it would doubtless be deemed a fixture, falling under the general rule, and immovable. But if the residence of the family were merely an

v. Judd, 14 Cal., 59 (1859). See, also, Davis v. Moss, 38 Pa. St., 346 (1861). [So, as to a shaft house, engine, etc., in a mine. Updegraff v. Lesem, 15 Colo. App., 297 (1900); and electrical apparatus. Hewitt v. General Electric Co., 164 Ill., 420 (1897).] So, as to iron rails laid by a tenant in a tunnel in a coal mine. Heffner v. Lewis, 73 Pa. St., 302 (1873). [Couch v. Welch, 24 Utah, 36, 47 (1901); Antrim v. Dobbs (1891), 30 L. R., Ire., 424. So, as to casings in oil or gas well, etc., Shellar v. Shivers, 171 Pa., 569 (1895); Siler v. Globe Glass Co., 21 Ohio C. C., 284, 288 (1900).] So, as to sheds erected by a tenant upon posts set in the ground, for the purpose of manufacturing brick. Beckwith v. Boyce, 9 Mo., 556 (1845).

[10] In 6 Law Mag., 96, referred to in Gibb. Fixt., 24, an opinion given by Sir John Richardson when at the bar, is printed, in which he states his opinion that kilns, sheds, and other conveniences erected by a tenant from year to year, used in the making of brick and tiles from materials on the demised premises, were removable as trade fixtures; and it is stated that they were accordingly removed, the right not being disputed by the landlord. See, also, Beckwith v. Boyce, 9 Mo., 556 (1845), cited in next note (*supra*).

[11] See Ferard Fixt., 66, 67.

[12] 2 Pet., 137 (1829). See, also, Lanphere v. Lowe, 3 Neb., 131 (1873).

accessory for the more beneficial exercise of the trade, and with a view to superior accommodation in this particular, then it is within the exception." * * * "The defendant was also a carpenter, and carried on his business as such in the same building. It is no objection that he carried on two trades instead of one. There is not the slightest evidence of this one being a mere cover or evasion to conceal another, which was the principal design; and unless we are prepared to say (which we are not), that the mere fact that the house was used for a dwelling house as well as for a trade, superseded the exception in favor of the latter, there is no ground to declare that the tenant was not entitled to remove it." This case seems to put the question in mixed cases upon its true basis: whether or not the erection in question was *bona fide*, and principally intended for trade purposes, as distinguished from erections as a means of enjoying the inheritance; and if the former is found to be the case, the erection comes within the spirit and true meaning of the exception as to trade fixtures. Indeed, in such a case there seems to be no need of a distinct classification for such so called mixed cases, which may, from their principal characteristics, properly be classed with trade fixtures.

The cases of tenants of nursery and garden grounds, are also usually classified with the mixed cases under considera-
[*107] *tion, and it is now well settled that trees, shrubs and plants, rooted in and growing in the soil of the demised premises, and so kept by the tenant for purposes of sale by him as articles of trade or merchandise in his business of a nurseryman, may be removed by him during his term, on the ground of his thus carrying on a species of trade.[2] But while a ten-

[2] Miller v. Baker, 1 Met., 27 (1840); s. c., 3 Law Reporter, 148; *dictum* in Penton v. Robart, 2 East, 88 (1801); Wardall v. Usher, 3 Scott N. R., 508 (1841); s. c., 10 L. J. (N. S.), C. P., 316; 7 Taunt., 191; Oakley v. Monck, L. R. 1 Exch., 163 (1866); King v. Wilcomb, 7 Barb., 263 (1849); Maples v. Millon, 31 Conn., 598 (1863). See, also, Brooks v. Galster, 51 Barb., 196 (1868); Fox v. Brissac, 15 Cal., 223 (1860). [Duffus v. Bangs, 122 N. Y., 423, 427 (1890), aff'g 50 Supr. Ct. (43 Hun), 52, 53 (1887). See, also, Hamilton v. Austin, 43 Supr. Ct. (36 Hun), 138, 143 (1885); Holmberg v. Johnson, 45 Kan., 197 (1891).]

[Nursery stock grown upon land by a lessee thereof, with the understanding that it was to be removed at will by him whenever large enough

ant of a nursery ground and garden, may at the expiration of his tenancy, remove such trees as are salable as such in his trade of nurseryman, yet he may not remove such as are not salable as trees, and are not fit to be removed, but are cultivated and used by the tenant as a market gardener, with a view to the fruit they yield.[3] It seems also that a farmer who raises young fruit trees on the demised premises for the purpose of keeping up the orchards, is not entitled to sell them unless he is a nurseryman, and makes it his trade;[4] and it was held in the *nisi prius* case of Watherell v. Howells,[5] that it was waste for an outgoing tenant of garden ground, to plow up strawberry beds in full bearing, notwithstanding the fact that when he entered he had paid for the same on a valuation to the person who assigned the lease of ground to him, and notwithstanding that it was usual for strawberry beds to be appraised and paid for, as between outgoing and incoming tenants. Lord Ellenborough in this case said, that though by custom the tenant might remove some things, which, by the general law, as affixed to the freehold, belonged to the landlord, this could never extend to enable him to sterilize the soil; that if the defendant in this case ploughed up the beds before they were exhausted, and without having any reasonable object in view, he had certainly prejudiced the plaintiff's reversionary in-*terest, and it could scarcely be doubted that he did so [*108] wrongfully and maliciously. Neither may a tenant (not a gardener by trade) remove growing box planted on the demised premises by himself, as borders to a walk made by him in the garden, unless by special agreement with the landlord.[6] It being

for transplanting, is not a part of the realty, and the lessee is the owner, and can bring an action for damages for its destruction. Adams v. St. Louis, &c., R'y Co., 138 Mo., 242, 250 (1897).]

[3] Wardall v. Usher, 3 Scott N. R., 508 (1841); s. c., 10 L. J. (N. S.), C. P., 316.

[4] Wyndham v. Way, 4 Taunt., 316 (1812), per Heath, J.

[Orchard trees, planted by a tenant, cannot be cut down nor removed by him; but, under clauses 1 and 3 of the Agricultural Holdings Act, 1883, where the landlord's consent in writing to planting is given, the tenant is entitled to compensation. Mears v. Callender [1901], 2 Ch., 388.]

[5] 1 Camp. N. P., 722 (1808).

[6] Empson v. Soden, 4 B. & Ad., 655 (1833); s. c., 1 N. & M., 720.

settled that nurserymen and gardeners may, during their term, remove the trees, shrubs and plants kept by them on the demised premises for purposes of sale, on the ground of their carrying on a species of trade, it seems equally clear that the greenhouses, hothouses, etc., put up by such tenants as accessories to carrying on such trade, may also be removed; and such seems to be the prevalent opinion.[7]

So, the articles annexed by a tenant may be of a mixed nature, combining the qualities of both trade and domestic fixtures, being designed by the tenant to be used in carrying

["Parke, J., there is no authority for saying that an ordinary tenant may take up growing trees without a special agreement for that purpose.] The question is, whether any damage results to the freehold. Could not a tenant remove flowers which he had planted in the ground? [Littledale, J., No. Denman, C. J. A border of box is a thing intended to be permanent. Parke, J. It might as well be contended that a tenant could take up hedges.] *Per curiam.* There must be no rule. Rule refused." [See Smith v. Felt, 50 Barb., 612 (N. Y., 1868).]

[The general property in "trees that are timber" is in the owner of the land on which they grow. Where a tenant, having a lease for fifteen years, planted algaroba trees, such trees not being useful for timber, but for firewood, he had a right to cut the same during his term. They are used chiefly for firewood, and may have been planted for that purpose. Liu Kong v. Keahialoa, 8 Hawaii, 511, 512 (1892).]

[A tenant may not remove ornamental shrubs, but may remove gravel from the walks, and wooden steps giving access to terraces. Burns v. Fleming (1880), 8 Sess. Cas., 4th Ser., 226.]

[7] In Penton v. Robart, 2 East, 88 (1801), Lord Kenyon said: "Shall it be said, that the great gardeners and nurserymen in the neighborhood of this metropolis, who expend thousands of pounds in the erection of green-houses and hot-houses, etc., are obliged to leave all these things upon the premises, when it is notorious that they are even permitted to remove trees, or such as are likely to become such, by the thousand, in the necessary course of their trade? If it were otherwise, the very object of their holding would be defeated. This is a description of property divided from the realty." See, also, Syme v. Harvey, 24 Sc. Sess. Ca., 202 (1861); Ferard Fixt., 70 and note; Gibb. Fixt., 30; Grady Fixt., 80, 83; Hill Fixt., § 27.

The above dictum of Lord Kenyon was, however, in Elwes v. Maw, 3 East, 38 (1802), disapproved by Lord Ellenborough; notwithstanding which, however, it is believed to be a correct statement of the law. See, also, comments of Dallas, C. J., in Buckland v. Butterfield, 2 B. & B., 58 (1820); s. c., 4 Moore, 440. [Royce v. Latshaw, 15 Colo. App., 420 (1900); Mears v. Callender, [1901], 2 Ch., 388, 396.]

on the business for which the premises were occupied, and also adapted for the more easy and comfortable use and enjoyment of the building to which they are annexed.[8]

*In concluding this section, it may be observed that [*109] the removability of fixtures, whether for the purpose of trade, ornament or convenience, or for domestic use, is sometimes affected by the influence of custom. As was observed by Story, J., in Van Ness v. Pacard,[9] every demise between landlord and tenant in respect to matters in which the parties are silent, may be fairly open to explanation by the general usage and custom of the country or of the district where the land lies. Every person under such circumstances is supposed to be conusant of the custom, and to contract with a tacit reference to it. It was accordingly considered in that case that it was competent to prove a usage and custom in the city of Washington, authorizing a tenant to remove any building which he might erect upon leased premises, provided the same was removed before the

[8] Thus, a wooden cistern lined with lead resting upon the floor of the attic, sinks made respectively of wood and marble, and fastened to the floor respectively by nails, and by being set into the floor by cutting away the boards, water pipes fastened by hooks driven into the wall, and terminating with faucets affixed by metal tacks to boards nailed to the wall, and gas pipes, kept in place by metal bands fastened to the walls, such water and gas pipes passing through holes cut in the flooring and partitions, and the gas pipes in some instances through ornamental centre pieces of wood attached to the ceiling, which were cut through for their removal—all being put in by the tenant of a building demised as a tavern and boarding house, and combining the qualities of both domestic and trade fixtures, are removable by such tenant during his term. Wall v. Hinds, 4 Gray, 256, 272 (1855).

[9] 2 Pet., 137, 148 (1829). See, also, Davis v. Jones, 2 B. & Ald., 165 (1818); Watherell v. Howells, 1 Camp. N. P., 227 (1808); Culling v. Tuffnal, Bull. N. P., 34 (1694); Teaff v. Hewitt, 1 Ohio St., 511, 534 (1853); Keogh v. Daniell (*infra*); Wigglesworth v. Dallison, and other cases cited *post*, in chapter on Emblements. [See Tucker v. Linger, (1883), 8 App. Cas., 508; Brown v. Herriott, 1 Kyshe, 43, 51 (Straits Set., 1842).]

[Where a custom is sought to be established that tenants engaged in the saw-mill business, have the right to remove temporary structures erected by them, but there is no evidence as to the length of time this right continues, and no removal is made for four months after the premises are abandoned, the common law rule will be applied. Youngblood v. Eubank, 68 Ga., 630, 632 (1882).]

expiration of the term;[2] and that parol testimony was competent to go to the jury to establish such a custom, its weight and credibility, however, being solely for the jury.

But the custom of the country can have no operation where [*110] *there is a contract between the parties, with provisions applicable to the point in controversy.[3]

II. Agricultural Fixtures.

In the case of Elwes v. Maw,[4] the distinction was first taken between buildings and erections annexed to the freehold for the purposes of trade, and those made for the purposes of agriculture, and better enjoying the immediate profits of the land, in

[2] A similar custom exists in the city of Milwaukee, and was held to be valid in Keogh v. Daniell, 12 Wis., 163 (1860).

See, also, 11 Vin. Abr., 154, where it is said: "A granary built on pillars in Hampshire is a chattel, and goes to the executors, and may be recovered in trover. This shall be understood, according to the custom of the country; *coram* Eyre, Ch. B., Summer Assizes, 1724, *apud* Winchester."

[3] Roxburghe v. Roberton, 2 Bligh, 156 (1820); Keogh v. Daniell (*supra*); Martyr v. Bradley, 9 Bing., 24 (1832). [Silliman v. Whitmer, 11 Pa. Super., 243, 259 (1899), aff'd in 196 Pa. St., 363, 365 (1900).]

In Keogh v. Daniell, the lease contained covenants on the part of the lessee to pay the rent, "except in case of the destruction of the premises by accidental fire," and to deliver up the premises at the end of the term, "reasonable use and wear thereof, and damages by accidental fire, or other accidents not happening through the neglect of the tenant, only excepted." These covenants occurring in the printed part of the printed forms in general use, and the rent being of small amount, such as would be paid for a mere lease of the ground, and the premises being at the time of the demise wholly unimproved, the covenants were held not to be inconsistent with such usage, nor to show an intention to enlarge the meaning of the word "premises," so as to make it include buildings and other improvements, where none were mentioned or included in the granting clause.

[4] 3 East, 38 (1802). This case has been regarded as a leading case upon the subject which it discusses.

Where permission was given by the owner of land to a tenant to cut down some timber on the land for the purpose of erecting a cattle-house thereon, and not *simpliciter* for his own, and the tenant using only a few boards of his own, proceeded to erect the building, which was composed of corner and side posts driven into the ground with the sides boarded up, but the roof was not on when the land was sold by the lessor, and the

favor of the tenant's right to remove the former, and negativing the right of removing the latter; and it was in that case held, that where a tenant in agriculture for a term of years had erected at his own expense, and for the mere necessary and con-
*venient occupation of his farm, a beast-house, carpen- [*111]
ter's shop, fuel-house, cart-house, pump-house, and fold-yard wall, which buildings were of brick and mortar, and tiled and let into the ground, he could not remove the same, though during his term, and though he thereby left the premises in the same state as when he entered. It is to be observed, with reference to this decision, in which the early authorities were quite fully considered, that it appears to be quite too strict and narrow a construction of the meaning of the words "trade," and a more strict and rigid enforcement of the rule *quicquid plantatur solo, solo cedit,* as between landlord and tenant for years, than a liberal interpretation of the term "trade," and the true grounds and spirit of the exception relating thereto seem to justify. It seems also opposed to the spirit of prior cases on the subject;[1] as it clearly seems to be to that of subse-

lessee was notified by the vendee to quit, and stopped work thereon and pulled down and removed the building from the premises. *Held,* that no question arose as between tenant and reversioner of the fixtures, it being obvious that the original owner of the land never meant the timber to be applied otherwise than to this house, and that defendant had no right to remove it. Smith v. Render, 27 L. J. Exch., 83 (1857).

[While the courts of this country have adopted a liberal rule, and have, to a certain extent, done away with the distinction between trade and agricultural fixtures, a tenant cannot sever a building which was upon the freehold when he took possession, use some of the material for a part of another house erected by him, and remove the latter house. Dougherty v. Spencer, 23 Ill. App., 357, 359 (1887).]

[A fence cannot be removed by a tenant, nor can any part of it though that part is easily removable. Knox v. Brotherton, 14 N. S. W., Supr. Ct., 185 (1875). See Minister for Lands v. Watt, 20 N. S. W., 229 (1899). See, also, Winans v. Beidler, 6 Okla., 603, 605 (1898), that agricultural tenants are not so much favored as trade tenants.]

[1] See the cases already cited (*ante*) in this chapter, particularly the so-called mixed cases; also, Bro. Abr. Waste, pl. 104; Id. Chattels, pl. 7; Day v. Austin, Owen, 70 (1595); Cooke's Case, Moore, 177 (1581); Ombony v. Jones, 19 N. Y., 234 (1859); Wall v. Hinds, 4 Gray, 256 (1859). This subject is learnedly considered in Ferard Fixt., *57 *et seq.*, where the case of Elwes v. Maw is severely criticised. See, *ante*, p. *102. See, also, 2 Smith's Lead. Cas. (7 Am. Ed.), 242, 258; 1 Wash. Real Prop., 114;

quent cases; and though perhaps the case is hardly to be considered as directly overruled, yet it has so often been criticised that it probably will not (at least in the United States), as between landlord and tenant for years, be considered as furnishing the rule for the decision of future cases on the subject when presented to the courts for determination. The subject was somewhat considered by Story, J., in delivering the opinion of the court in Van Ness v. Pacard;[2] referring to the case of Elwes v. Maw, he said: "The court there decided, that in the case of landlord and tenant, there had been no relaxation of the general rule in cases of erections solely for agricultural purposes, however beneficial or important they might be [*112] *as improvements of the estate. Being once annexed to the freehold by the tenant, they became a part of the realty, and could never afterwards be severed by the tenant. The distinction is certainly a nice one, between fixtures for the purposes of trade, and fixtures for agricultural purposes, at least in those cases where the sale of the produce constitutes the principal object of the tenant, and the erections are for the purpose of such a beneficial enjoyment of the estate. But that point is not now before us; and it is unnecessary to consider what the true doctrine is or ought to be on this subject. However well settled it may now be in England, it cannot escape remark, that learned judges at different periods in that country have entertained different opinions upon it, down to the very date of the decision in Elwes v. Maw, 3 East, 38. The common law of England is not to be taken in all respects to be that of America.

Wansborough v. Maton, 4 Ad. & E., 884 (1836); s. c., 6 N. & M., 367; Dean v. Allalley, 3 Esp., 11 (1799).

The correctness of the rule in Elwes v. Maw, has, however, been maintained by other writers on the subject. See Gibbons Fixt., *26 *et seq.;* Grady Fixt., *63 *et seq.;* Brown Fixt., § 32; Hill Fixt., § 23 *et seq.*

[Cabins and bridges placed upon a plantation by a lessee belong to the owner of the soil. Penn v. Citizens' Bank, 32 La. Ann., 195, 200 (1880).]

[Where, by contract, a manager of a plantation agreed to pay all "real charges," it is optional with him as to what improvements he will make; but if he makes any, he is not entitled to compensation therefor, nor has he a right to take them away. Long v. Kee, 42 La. Ann., 899, 906 (1890).]

[2] 2 Pet., 137 (1829).

Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation. There could be little or no reason for doubting that the general doctrine as to things annexed to the freehold, so far as it respects heirs and executors, was adopted by them. The question could arise only between different claimants under the same ancestor, and no general policy could be subserved by withdrawing from the heir those things which his ancestor had chosen to have annexed to the inheritance. But, between landlord and tenant, it is not so clear that the rigid rule of the common law, at least as it is expounded in 3 East, 38, was so applicable to their situation as to give rise to necessary presumption in its favor. The country was a wilderness, and the universal policy was to procure its cultivation and improvement. The owner of the soil as well as the public had every motive to encourage the tenant to devote himself to agriculture, and to favor any erections which should aid this result; yet, in the comparative poverty of the country, what tenant could afford to erect fixtures of much expense or value, if he was to lose his whole interest therein by the very act of erection? His cabin or log hut, however necessary for any improvement of the soil, would cease to be his the moment it was *finished. It might, therefore, deserve consideration, [*113] whether in case the doctrine were not previously adopted in a State by some authoritative practice or adjudication, it ought to be assumed by this court as a part of the jurisprudence of such State upon the mere footing of its existence in the common law.'' The views thus advanced by Story, J., in Van Ness v. Pacard, have been approved by several learned judges in the different States, as will be seen from the references in the note below.[1]

[1] See, also, Holmes v. Tremper, 20 John., 29 (1822), holding a cider-mill and press erected by a tenant from year to year on the demised premises for his own use in making cider on the farm, to be removable at the expiration of his tenancy.

[See Gardiner v. Parker, 18 Gr. Ch., 26, 30 (Ont., 1871), where reference was made to the fact that the tenant manufactured and sold wine, but it was not contended that the fixtures put up by him were trade fixtures.]

[A blacksmith shop moved to the farm by means of two runners at-

There does not seem, however, to have been any adjudication in the United States on the question as between landlord and tenant for years, directly overruling Elwes v. Maw. In the case of McCullough v. Irvine's Executors,[2] the question was somewhat considered in a case between the executors of a tenant for life and the reversioner. This was an action on the [*114] *case in the nature of waste, in which the injury complained of was, *inter alia,* the pulling down and removing the structures described in the opinion of the court, which was de-

tached to the bottom, and brought there to be used temporarily, and which remained upon such runners, does not become a fixture. Smyth v. Stoddard, 203 Ill., 424, 432 (1903).]

[Stables resting upon, but not fastened to, blocks sunk into the ground, are removable by a tenant. Weathersdane Park Co. v. Watson, 16 Vict., 758, 760 (1890).]

In White v. Arndt, 1 Whart., 94 (1835), Rogers, J., in referring to this distinction, said: "The question does not depend upon the size or form of the house, or the manner in which it is built; but the only inquiry always is, whether it was intended for purposes of trade or not; and I cannot believe that the nature of the business, whether agricultural or mercantile, can make any difference." See, also, Haflick v. Stober, 11 Ohio St., 482 (1860).

[In Davis v. Eastham, 81 Ky., 116, 118 (1883), Hargis, C. J., thinks the broad rule with reference to manufacturing and trade should be extended to agriculture.]

In Dubois v. Kelly, 10 Barb., 501 (1851), Harris, J., also quoted approvingly the above observations of Story, J., in Van Ness v. Pacard, and further said: "This distinction, although it may not have been in any single instance broken down by any adjudged case, has not, I am persuaded, been regarded with much favor in this country, if, indeed, it has in England. The foundation upon which it rests is narrow and artificial. The general policy which has created exceptions to the general rule, that whatever is affixed to the freehold cannot be removed without the consent of the owner of the inheritance, applies as well to erections for agricultural and other purposes, as to erections for the purposes of trade."

See, also, *dicta* in Teaff v. Hewitt, 1 Ohio St., 532 (1853); Harkness v. Sears, 26 Ala., 497 (1855); Leland v. Gassett, 17 Vt., 411 (1845); Wing v. Gray, 36 Vt., 267 (1863), where hop poles set in the ground by an agricultural tenant, were held removable; Perkins v. Swank, 43 Miss., 362 (1870); McKim v. Mason, 3 Md. Ch. Dec., 195 (1852); Whiting v. Brastow, 4 Pick., 310 (1826); 2 Kent Com., 346. [See Crocker v. Donovan, 1 Okla., 165, 174 (1892); Carver v. Gough, 153 Pa. St., 225 (1893).]

[2] 13 Pa. St., 438 (1850). See, also, Haflick v. Stober, 11 Ohio St., 482 (1860).

livered by Coulter, J.: "* * * * * The main question to be resolved in the case in hand is, therefore, whether the brick house two stories high, and the bank barn" [the under part of which was stone, and the upper part frame], "66 feet long by 33 feet wide and 7 feet of an overshot, with corn-crib and wagon-shed erected by the tenant for life during the life of his wife and child, who were the owners of the remainder in fee of two-thirds, did become part of the freehold and inheritance or not. The tenant for life, Irvine, was the owner of the other third in fee; and after the death of his wife and child he threw down the house and barn, and hurled the materials away,[1] because the remainderman would not give the price he asked for the whole inheritance. This suit is instituted by the remainderman against the executors of Irvine, who held the life estate" [by curtesy] "in two-thirds of the freehold. The defendants allege that, notwithstanding Irvine pulled down the house and barn and its adjuncts and sold off a large quantity of timber, leaving but a small portion of woodland, yet he is not answerable in damages, because the land at the death of Irvine, in its denuded state was worth as much and more than it was valued at when the life estate first accrued and he took possession. And the court below sustained this ground, summing up their instructions to the jury in these comprehensive words: 'But if the inheritance was left as valuable by the tenant for life, independent of the consideration of his own acts and conduct respecting it, as when he entered upon it, and more so, then we think the plaintiff is not entitled to recover.' I cannot assent to this view of the case. It is attempted to be sustained by those exceptions to the general rule of permanent improvements becoming part of the freehold, which in favor of trade, permit fixtures or machinery to be severed from the inheritance by a tenant. Agriculture is denominated a trade, and a brick house and barn are alleged to be the implements *and instruments by which it is carried on, and which [*115] are essential to its comfortable prosecution. The hypothesis has a bold and dashing novelty about it, and is not without plausibility. Husbandry has been considered a more primitive and

[1] The Reporter's statement of the facts in the case, states that he threw them down and removed them to other land of his own.

simple occupation than handy work or mechanism, and it is by some called a science. But call it a trade; still, its success and its products depend upon the showers of heaven and the nutriment of the earth. A cider press is an instrument by which cider is made, and, like a plough and a harrow, or a threshing machine, is an implement of agriculture and belongs to the tenant. But a two story brick house and a large bank barn are not instruments or implements of any trade. But they are great conveniences which enable men of all sorts to enjoy the fruits of their labor or trade. If you make these an exception, the rule itself is obliterated, and nothing is essentially of the realty, except the earth itself and that which is in its bowels.

"The exceptions have been carried very far by some decisions in the Eastern States, particularly in Whiting v. Brastow, 4 Pick., 310; Holmes v. Tremper, 20 Johns., 29, and also in Van Ness v. Pacard, 2 Peters, 137. It is, however, in somewhat loose expressions of the court in those cases, and not from the cases themselves, that the principle asserted by the court below derives some countenance. The first, where the *dicta* is the most latitudinarian, was merely the removal of a padlock and some loose boards, about which there never could have been any reasonable doubt. The second was the removal of a cider press by the tenant; and there no reasonable doubt of its being an implement for the manufacture of cider could be entertained. The last case runs to a little more magnitude, for it was removing a sort of a house, but a house erected for the purpose of manufacturing a commodity; it was more properly a shop for making oil;[1] and the decision goes expressly on the ground of its not being a dwelling house. But none of these cases, either expressly or by implication, overrule or im- [*116] *peach the case of Elwes v. Maw, 3 East, 38, in which it was held that an agricultural tenant could not remove, during the continuance of his lease, a beast-house, carpenter-shop and fuel-house, etc., erected for the use of the farm, even though

[1] This is an error. The tenant was a carpenter by trade, and erected the building in question with a view to carry on the business of a dairyman. Perhaps "oil" is regarded as synonymous with the usual products of such shops.

he left the premises as he found them. In that case the whole law on that subject was ably reviewed; and although it is an English case, I believe it to be the law of Pennsylvania, and for the very same reason that the court below give for a contrary opinion. In my judgment that is a rule which tends to promote the interests of agriculture, while its converse would tend to retard and impend" [impede] "its progress. We must have many tenancies for life in Pennsylvania by will, by deed, and by descent; and if the tenant, after having enjoyed the fruits of the land during perhaps a long life, may, just before his death, strip it of the fences he has built, and the house and barn he has erected, because the advance in the improvement and commerce of the country would leave the land of as much intrinsic value as when he took possession, and convert it into a solitary waste for the winds to moan over, the tenant of a new generation will have to take the land as it was a generation before,-and commence improvements *de novo*. This, I apprehend, would be a slovenly mode of promoting the interests of agriculture. There is a debt due to the land in return for its fruits and products, and a good tenant for life always pays it. He manures it, fences it, and builds a habitation on it, and they become part of the freehold, and thus the interest of agriculture is promoted. These exertions are the voluntary gift of the life tenant to the inheritance. He dedicates them to the inheritance when he has enjoyed the fruits of his labor. A good farmer creates but does not destroy; and I may add, that this rule, just in itself, has a tendency to liberalize the social affections as well as to promote agriculture. It banishes that sordid and selfish spirit which would destroy what the individual can no longer enjoy.

"All fixtures and erections which the law allows a tenant for years to remove, are put up for the avowed purpose of a temporary occupancy. He pays a suitable compensation under contract for liberty to erect them for the uses of his particular *trade or calling. They are designed for his use, and his [*117] alone. Not so with the tenant for life in the case on hand. He was himself owner of one-third of the inheritance, his wife and child were owners of the reversionary interest in the other two-thirds. Who, then, can doubt his intention of making these buildings with a view of benefiting the inheritance for himself,

for his wife and child; by that intent and act he dedicated them to the freehold, and so incorporated them with the inheritance as to foreclose his power of recall after the death of his wife and child to the disherison of their heirs."

With reference to this decision, which we have deemed of sufficient importance to warrant quotations therefrom at considerable length, it is to be observed that, notwithstanding the *dictum* approving the case of Elwes v. Maw, which is probably to be understood as referring only to this case, and not to the general doctrine as to tenants for years, it is hardly to be considered as an authority against the right of an agricultural tenant for years to remove, during his term, erections made by him upon the demised premises for the purpose of agriculture. The case arose between the executors of the tenant for life and the reversioner, between whom, as we have already seen, the rule is not so liberally applied in favor of the tenant, as between an ordinary tenant for years and his landlord. Had the decision in this case been in favor of the right of removal, it would have been an authority in favor of the right of a tenant for years to remove a similar erection, as against his landlord; but the converse of this proposition is by no means true. The case itself was undoubtedly correctly decided, and the distinction between the rights of tenants for life and tenants for years, as to erections like the ones in question, properly made. As was well observed by Chancellor Cooper, in Cannon v. Hare:[1] "Tenants for life are usually widows as dowresses, or husbands as tenants by curtesy, or devisees under wills with remainder [*118] *to children or other blood relations. The persons entitled in remainder in such cases, are ordinarily those nearest in ties of affection and blood to the tenants of the life estate. It may well be presumed, as between such parties, that improvements put upon the property by the life tenant are not designed for the temporary use of such tenant, but as permanent ameliorations." And especially is it so, where, as in this case, the life-

[1] 1 Tenn. Ch., 22, 33 (1872); 1 South. Law Rev. (1872), 246.

In Cannon v. Hare, it was held that buildings erected on a dower estate by the dowress or person claiming under her, if designed as additions to the freehold, or to enhance its convenience or income, pass, on the death of the tenant for life, to the remainderman.

tenant was himself the owner in fee of one-third of the inheritance. And in general, it may perhaps be said, that the presumption of intention to make annexations, like the ones in question, a permanent accession to the realty, is much more forcible in such a case, by reason of the probably extended duration of the tenant's estate, than in case of a tenant for years, even though there are no ties of blood and affection between the tenant for life and reversioner, as in the case under consideration.[2]

With reference, however, to the general observations of the learned judge who delivered the opinion, as to agriculture's not being a trade, etc., within the meaning of the exception, such observations, so far as they may be considered to apply to tenants for years, were mere *dicta*, and seem opposed to the general current of judicial opinion in this country.[3]

And if agriculture be conceded to be a trade within the meaning of the exception, a distinction might properly be made between the dwelling-house[4] and the barn, and other erections in question in said case. Dwelling-houses being intended for purposes of habitation, are equally necessary to the farmer, tradesman, and gentleman of leisure following no occupation, and when used solely or principally for such purposes, cannot properly be said to be accessory to a trade; but the barn and other erections in question, as between landlord and tenant for years, seem as properly to be instruments or implements of, or accessory to, a trade, as the ice-house for the storage of ice, in Antoni v. Belknap,[5] or the ball-room erected *by the tenant for use in his business as inn-keeper, in [*119] Ombony v. Jones.[6]

[2] See 1 Wash. Real. Prop., 114, 115.

[3] See the cases referred to, at the beginning of this subject (*ante*, p. *113).

[4] See the subject of dwelling-houses further considered, *post*. See, however, Haflick v. Stober, 11 Ohio St., 482 (1860).

[5] 102 Mass., 193 (1869).

[6] 19 N. Y., 234 (1859). See, also, (*ante*, p. *102). The words, "instruments," and "implements," used in the case of McCullough v. Irvine (*supra*), with reference to trade fixtures, seem entirely too narrow; for it can hardly be said that any house is, in strictness, an instrument or an implement of trade; and yet it is acknowledged by nearly all the authorities on the subject, that such erections, when accessory to a trade, and

Among those who concede the binding authority of Elwes v. Maw, there has hitherto existed some difference of opinion as to the exact scope of that case as an authority, some contending that the case is conclusive against the privilege of all agricultural tenants to remove any kind of fixtures erected on the farm during their term,[7] and others construing the case somewhat strictly, and contending that the judgment has no reference to any other species of fixtures than those then under the consideration of the court, and that the case is only an authority against the removal of those and similar erections, "which have no reference to trade, no reference to manufactures or machinery, but were erected 'for *mere* agricultural purposes.'"[8] The latter seems to be the more prevalent and the better opinion; and it may probably be taken as a correct statement of the law, even where Elwes v. Maw is regarded as a binding authority on the question, that mere implements or articles of machinery, used as a means of facilitating the labor of the tenant, not intended to be a permanent accession to the realty, and removable *integre salve et commode,* may [*120] *be removed by the tenant for years during his term, even though erected for agricultural purposes.[9]

removable *integre, salve,* etc., may be removed by the tenant during the term. If agriculture be conceded to be a trade, it can hardly be said that the barn, corn-crib, etc., in question, were not accessory thereto. See, however, Grady Fixt., 82. Erections accessory to trade, or "for the sake of trade," as it is expressed in Dudley v. Warde, 1 Ambl., 113 (1751), seems a more appropriate form of expression.

[7] See Grady Fixt., 73; Ferard Fixt., 56.

See, also, Leach v. Thomas, 7 C. & P., 327 (1835); where it was *held,* that a tenant had no right to remove small pillars of brick and mortar, built by him on the dairy floor to hold pans, though such pillars were not let into the ground.

[8] See Grady Fixt., 73, *et seq.*

[9] There seems to be very little, if any, authority on this question. In 6 Law Mag., 97, may be found printed the opinion of Mr. R. H. Williamson, of Newcastle, upon the following case: "A farmer, occupying a farm of considerable extent, for the greater facility and expedition of threshing the corn growing upon the same, erects a threshing-machine at his own expense, the machinery of which he encloses and supports by pillars and a brick wall or case, and covers the same with pantiles; the pillars and wall rest upon the freehold, and the wood, that supports the roof on that side next the barn, touches or rests upon the roof of the

barn. Mr. W. will please give his opinion, whether the tenant can legally remove or dispose of the machine, and also the pillars, walls and pantile roof, to and for his own use and benefit.

"OPINION.—I am of opinion that the tenant cannot justify the removing the pillars, walls and pantile roof. With respect to the machinery, the right of the tenant to remove it may depend upon the fact, whether it is or is not fastened to the walls, or pillars, or roof; if it is not so fastened, and can be removed without breaking the walls, pillars or roof, then the tenant may justify its removal; but if otherwise, the case of Elwes v. Maw, 3 East, 38, appears to me to afford an authority against the tenant's right to remove this threshing-machine. Newcastle, November 9, 1816. R. H. W." The correctness of this opinion is disputed in Gibbons on Fixtures, page 29, where the distinction is taken between the buildings in Elwes v. Maw, and such threshing-machine, which was regarded by the author as a substitute for labor and an implement of trade. "Threshing is as much a trade as drawing coals from a mine or bruising apples in a mill. The true distinction, as the writer takes it, is between buildings which are convenient or necessary merely to the occupation of lands, and fixtures which are assistant to the tenant in his operations of skill and labor, or in other words, his trade." See, also, Hill Fixt., § 26.

The same question arose in the circuit case of Shinner v. Harman, 3 Ir. Com. Law, 243 (Cork Spring Assizes, 1853, *coram* Ball); but the case was decided upon another ground. In that case a tenant set up, on the premises, at his own expense, for agricultural purposes alone, a threshing-machine, and erected over it a house or shed for preserving and working it properly. The threshing-machine was set up in the following manner: "A large round stone was fixed in the ground outside the house which was built for the threshing-machine, through which four iron bolts were passed through holes in the stone four feet apart; these stood perpendicularly, and were fastened at one end into the stone, and at the upper end there were nuts which screwed on. A metal frame was then placed upon the stone, through which these four bolts passed, and the frame was then secured by the nuts which were screwed down on the iron bolts. This frame was removable by unscrewing the nuts, without destroying or injuring the bolts and stones. From this frame, a shaft of iron about fourteen feet long, called the spindle, and which worked the machinery which was inside the house, passed through a hole in the wall, but was not in any way connected with the wall. The machine itself was inside, and was fastened by wooden pins to four pieces of timber let into the ground in such a manner that by taking out the pins it could be removed without injury to the house or the timber-work into which it was thus inserted. The defendant, also, while in possession under the lease, put up in the corner of one of the out-houses on the demised premises, a steam boiler which was set in brick-work; the brick-work touched both walls, and was built on the floor; the boiler was set in the brick-work, with mortar, but in such a manner that, by removing some of

The question in England has, however, been settled by the [*121] *interposition of Parliament—14 & 15 Vict., Chap. 25, Sec. 3—by which the rights of agricultural tenants to fixtures erected by them have been considerably extended.[1]

the bricks of the front wall, the boiler could be removed without injury to itself or the out-house." In this case, upon the authority of Culling v. Tuffnal, Bull. N. P., 34 (1694), and the cases following it, and particularly Hellawell v. Eastwood, 6 Exch., 295 (1851), it was *held*, the threshing-machine and steam-boiler were not fixtures, but removable chattels of the tenant, which he was entitled to remove at the end of his term.

In delivering his opinion, however, Ball, J., said: "However, it is to be observed, that in that case [referring to Elwes v. Maw], the erections consisted of buildings having their foundations sunk in the soil, and therefore permanently affixed to the freehold, and incapable of being removed by the tenant without being utterly destroyed. Accordingly, if it were necessary for me to decide whether the case of Elwes v. Maw were an authority to rule the present, I should have to consider whether, regard being had to the character of the articles which were removed by the tenant in this case, as well as to the limited extent of their connection with the building, the principle upon which *buildings*" [the italics are the judge's], "constructed for agricultural purposes, were ruled in that case not to be removable by the tenant, was applicable to the case now before me. However, I do not find it necessary to enter upon the consideration of that matter," etc.

See the cases cited *ante*, in this chapter, under the head of Mixed Cases.

[A tenant of a plantation has, under the generous exceptions in favor of tenants, the right to remove a cotton-gin, condenser, etc., placed by him upon the leased premises; and a purchaser from him of these articles has also a right to remove them. "The placing of gins, condensers, etc., on plantations cultivated largely in our staple product, cotton, are essential to the preparation and manufacture of the article for market, and the rights of tenants, as against the landlords, are not to be doubted." McMath v. Levy, 74 Miss., 450, 451 (1896).]

[1] This statute, which does not extend to Scotland, provides, "that if any tenant of a farm or lands, shall, after the passing of this act" [July 24th, 1851], "with the consent in writing of the landlord, for the time being, at his own cost and expense, erect any farm building, either detached or otherwise, or put up any other building, engine or machinery, either for agricultural purposes or for the purposes of trade and agriculture (which shall not have been erected or put up, in pursuance of some obligation in that behalf), then all such buildings, engines and machinery, shall be the property of the tenant, and shall be removable by him, notwithstanding the same may consist of separate buildings, or that the same, or any part thereof, may be built in, or permanently fixed to, the soil, so as the tenant, making any such removal, do not in any wise injure the land or build-

Manure.

*Questions as to the right to manure as between the [*122] landlord and tenant may properly be considered in this connection.

Manure, under some circumstances, and as between some parties, is personal property, while in other cases it is a part of the realty.[1]

ings belonging to the landlord, or otherwise do put the same in like plight and condition, or as good plight and condition, as the same were in before the erection of anything removed; provided, nevertheless, that no tenant shall, under the provisions last aforesaid, be entitled to remove any such matter or thing as aforesaid, without first giving to the landlord or his agent, one month's previous notice, in writing, of his intention so to do; and thereupon it shall be lawful for the landlord or his agent, on his authority, to elect to purchase the matters and things so proposed to be removed, or any of them, and the right to remove the same shall thereby cease, and the same shall belong to the landlord; and the value thereof shall be ascertained and determined by two referees, one to be chosen by each party, or by an umpire to be named by such referees, and shall be paid, or allowed in account by the landlord, who shall have so elected to purchase the same."

[See the Agricultural Holdings Acts subsequently passed.]

[1] In Carver v. Pierce, Sty., 66, 73 (1647); Aleyn, 32, in an action upon the case, it was held that the words, "Thou art a thief, and hast stolen my dung," were actionable. Roll, J.: "Dung may be a chattel, and it may not be a chattel; for a heap of dung is a chattel, but if it be spread upon the land it is not." This proposition was approved in Ruckman v. Outwater, 28 N. J. L., 584 (1860); it is not, however, universally true. See Wetherbee v. Ellison, 19 Vt., 379 (1847); Sawyer v. Twiss, 26 N. H., 347 (1853); (*post*, page *305) Vendor and Vendee, where the subject is more fully considered.

In Pinkham v. Geer, 3 N. H., 484 (1826), manure lying upon the earth, but not incorporated with the soil, was held to be personal property, for which trover would lie if wrongfully converted. The manure in this case, however, was not made on the land of the owner thereof, but on the land of another, and it did not appear that such other made any claim to it. But in Sawyer v. Twiss, 26 N. H., 345 (1853), where the manure was made on a farm owned and occupied by the defendant, and was lying in heaps about the barn, it was held that manure made upon the farm in the ordinary course of husbandry, is a part of the realty, and cannot be attached or taken on execution as personalty separately from the land. [See, *post*, p. *430.]

In Haslem v. Lockwood, 37 Conn., 500 (1871), manure which had accumulated in a frequented public street of a borough, where the fee of

[*123] *Notwithstanding the general tendency of judicial opinion in the United States towards extending the doctrine of trade fixtures, so as to include certain erections for agricultural purposes, it seems well settled that manure[1] made by a tenant upon a farm under a farming lease in the ordinary course of husbandry, in the absence of any special contract or any custom to the contrary, belongs to the farm as an incident necessary for its improvement and cultivation, and is the property of the lessor, subject only to the right of the tenant to use it during the term in the cultivation of the land, and the tenant has no right to remove or dispose of it, or to apply it to any other use, either during or after the expiration of his tenancy.[2] Where the landlord is allowed to hold the manure,

the street belonged to the borough, was raked into heaps by the plaintiff in the evening, and left in that condition to be carried away by him the next evening. During the forenoon of the next day the defendant, finding the manure in heaps, removed it to his own land. *Held*, that the plaintiff might recover therefor in trover. Synopsis of argument: Manure made in the usual course of husbandry, is real property for the benefit of agriculture; but this principle does not apply to this case. This manure scattered upon the surface of the ground, was, under the circumstances of this case, personal property. It belonged originally to the travelers whose animals dropped it, but being worthless to them, was immediately abandoned. Whether it became the property of the borough, it is unnecessary to determine, as its removal was an advantage to the borough, and no one objected; and, at all events, plaintiff had a right to the immediate possession as against a mere wrong doer, and had a reasonable time for its removal; and twenty-four hours is considered a reasonable time.

[1] Straw raised on a farm is a part of the crop, and belongs to the owners thereof, and does not necessarily belong to the farm; nor is there any general usage requiring it, like manure, to be used on the land where raised. Fobes v. Shattuck, 22 Barb., 568 (1854).

[2] Middlebrook v. Corwin, 15 Wend., 169 (1836); Perry v. Carr, 44 N. H., 118 (1862); Lassell v. Reed, 6 Me., 222 (1829); Gallagher v. Shipley, 24 Md., 427 (1865); Daniels v. Pond, 21 Pick., 367 (1838); Plumer v. Plumer, 30 N. H., 558 (1855); Lewis v. Lyman, 22 Pick., 442 (1839); Lewis v. Jones, 17 Pa. St., 262 (1851); Sawyer v. Twiss, 26 N. H., 346 (1853); Barrington v. Justice, 4 Pa. Law Journ., 289 (1845). See, also, Hill v. De Rochemont, 48 N. H., 87 (1868); 5 Ves., 147, 260, 261; 16 Id., 173; 2 Kent Com., 347; Woodf. Land. & T. (10 Eng. ed.), 550; Brown v. Crump, 1 Marsh., 567 (1815); Legh v. Hewitt, 4 East, 154 (1803). [Bonnell v. Allen, 53 Ind., 130, 137 (1876).] And it is immaterial that such manure is lying in heaps about the barn and in the farm-yard;

Lassell v. Reed, 6 Me., 222 (1829); Sawyer v. Twiss, 26 N. H., 347 (1853); or, that it is made from hay belonging to the tenant, where such hay was raised on the farm demised, and where the rules of good husbandry require such manure to be expended on the farm. Wetherbee v. Ellison, 19 Vt., 379 (1847).

The rule in North Carolina is different from that stated in the text, it being there held that an out-going tenant, in the absence of contract or custom to the contrary, may remove all the manure made on the farm by him, as his own personal property. Smithwick v. Ellison, 2 Ired. Law, 326 (1842). The clear weight of American authority, however, is opposed to the doctrine of this case. See, however, Ruckman v. Outwater, 28 N. J. L., 581 (1860).

In Staples v. Emery, 7 Me., 201 (1831), a distinction was taken between the removal of manure by a tenant for one year, or a tenant for years, at the end of his term, and the removal thereof during a year preceding the last of a term of a tenant for years; and it was *held*, that the manure in the barn-yard of a farm in the possession of a tenant at will, was liable to be seized during the continuance of his tenancy, and sold on execution against such tenant for the payment of his debts. Mellen, C. J.: "Suppose a tenant for five years should the second, third, and fourth years, sell all the manure and manage the land without any; whose loss would it be? He would be injuring himself, destroying his own profits to a certain extent, and rendering himself less able to pay the rent. Still, would he not have a right to proceed in this manner? At least, might he not convert it to his own use in this imprudent manner without being a trespasser, or the purchaser being liable in an action of trespass or trover? And has the owner any other remedy than an action for damages for bad husbandry and mismanagement of the farm? In the case supposed, the manure is a part of the annual produce of the farm, and as such belongs to the tenant, and might be attached and sold on execution, to satisfy the debts of such tenant, without rendering the officer or the creditor a trespasser. That is to say, a tenant, as in the case supposed, may injure himself and impair his own profits; but the manure of the season next before the known term of the lease, is the produce of that season, and designed for the use of the farm the following season, at which time the owner is to occupy or have control of the land, as in the above-mentioned reported case. [Lassell v. Reed, 6 Me., 222 (1829).] Now, all the observations made on this head apply to the lease at will in the case under consideration," etc. No authority is cited by the court to sustain this distinction; and it is difficult to understand why any different reason applies to the last than to a prior year of the term, or why what is bad husbandry and mismanagement one year, should not be equally so the last year of the term; or why, if the manure is a part of the annual produce of the farm, and as such belongs to the tenant one year, it does not also belong equally to him the last year. The case does not seem to have been followed by any subsequent case, but on the other hand, seems to be opposed in principle by the cases cited at the beginning of this note.

[*124] *the reason for the rule seems to be the fact that the manure is made from the produce of the farm, and to allow the tenant to remove it, would tend to impoverish the farm, it being [*125] im*plied from the letting of a farm for agricultural purposes, that the tenant will cultivate the land according to the rules of good husbandry.[1] But where the manure is made from produce obtained elsewhere, and is not so commingled that its amount cannot be ascertained; or, where the lands are not agricultural lands; or, the manure is made in a tenancy not connected with agriculture, as in a livery stable, etc., no such reason, and therefore no such rule, exists.[2] And where a lease

[1] See Brown v. Crump, 1 Marsh., 567 (1875); Legh v. Hewitt, 4 East, 154 (1803); Lewis v. Jones, 17 Pa. St., 262 (1851).

[2] See Carroll v. Newton, 17 How. Pr., 189 (1858); Gallagher v. Shipley, 24 Md., 427 (1865); Daniels v. Pond, 21 Pick., 367 (1838); Plumer v. Plumer, 30 N. H., 558 (1855); Corey v. Bishop, 48 N. H., 146 (1868); Needham v. Allison, 24 N. H., 355 (1852). [Nason v. Tobey, 182 Mass., 314, 315 (1902).]

Thus, a tenant of a house, barn, grocery, and garden, who uses the barn for keeping some eighteen or twenty horses, is entitled to the manure, it not being made in the ordinary course of husbandry, and being made from his own fodder, and he may sell or remove the same as against his landlord. Carroll v. Newton (*supra*). See, also, Corey v. Bishop (*supra*). And manure made under such circumstances, and thrown in piles by itself, may be removed either during or after the tenancy as personal property. "It would not stand upon the ground of an article of property affixed to the freehold by the tenant during his term, which he might remove before the term expired, if he could without injury to the freehold, but not afterwards; but would more nearly resemble the building built on land of another, with the consent of the owner of the land, and to be removed at the pleasure of the owner of the building. It being the plaintiff's chattel on the land of another with his permission, plaintiff might enter at any time and remove it. If, after he should be notified to remove it, he did not do so in a reasonable time, he might be liable for trespass for the entry to remove it, otherwise he would not be. Dame v. Dame, 38 N. H., 429;" Corey v. Bishop (*supra*). See, also, Fletcher v. Herring, 112 Mass., 382 (1873). See, however, Smithwick v. Ellison, 2 Ired. Law, 329 (1842). And if the lessor during the continuance of such tenancy, sell and convey the land on which such manure is situated to a third person having notice, but without reserving the manure, the purchaser cannot hold such manure. Corey v. Bishop (*supra*).

[Where a tenant kept hogs in a barn-cellar and a yard adjoining, which were not fed upon the produce of the farm, he is, after the expiration of

*of farming land is general in its provisions and terms, [*126] and says nothing as to the purpose for, or the mode in which the lessee is to use or occupy the demised premises, the lessee is clothed with the right to occupy and use the land for any lawful purpose not injurious to the reversion; and where under such a lease the land is used for other than agricultural purposes, the rule governing a farming lease is not applicable, and the tenant may remove the manure so far as it is not commingled with the soil, provided he exercises this right with such care and skill as to prevent injury to the land.[1]

the tenancy, entitled to the manure as against a grantee with notice. Snow v. Perkins, 60 N. H., 493 (1881).]

[Where the grantor took from his grantee a lease of the buildings upon the land, in which buildings was a quantity of fodder belonging to the grantor, and which he might have removed, the manure made from such fodder belongs to the tenant. His rights are the same as they would have been if he had purchased the fodder. Taylor v. Newcomb, 123 Mich., 637 (1900).]

In Lassell v. Reed, 6 Me., 222 (1829), some of the hay used in the production of the manure was purchased and carried upon the farm by the tenant, and the residue was cut on the farm; and the court, *per* Mellen, C. J., observed that they did not consider the case in any way changed by the fact that a part of the fodder was carried on to the farm by the tenant. In this case, however, it does not appear that the manure made therefrom was kept separate from that produced from the fodder raised on the farm, and hence the case does not seem to be an authority opposed to the statement in the text. See, also, Lewis v. Jones, 17 Penn. St., 262 (1851), where it was *held*, that the fact that the tenant had bought *some* hay and *some* grain not raised on the premises, without specifying how much, did not alter the case, especially where the manure made therefrom was commingled with that made from the produce of the farm. The doctrine of confusion of goods properly applies to such a case.

[Manure made upon a farm by the consumption of its products in the ordinary course of husbandry is a part of the realty, and can not be sold nor carried away by a tenant; but it is otherwise as to manure where the fodder is purchased or raised by the tenant upon other lands. And if the two, being of the same quality and value, are intermingled by the tenant with no wrongful intent, he does not lose ownership of his proportion. Pickering v. Moore, 67 N. H., 533, 534 (1893).]

[1] Gallagher v. Shipley, 24 Md., 418 (1865). In this case, under such a lease, the land was used as a corral or pen for herding large numbers of cattle brought thither to be slaughtered for use in the armies of the United States, and fed with provender brought from sources foreign to the land, and it was *held*, that the tenant might remove the manure there-

While, as has already been observed, without any stipulation therefor, it is implied from the letting of a farm for agricultural purposes, that the tenant will cultivate the land according to the rules of good husbandry, which requires, as hereinbefore stated, that the manure made during an agricultural tenancy should be used on the land, still, the known usages, customs and practice of the neighboring country, often form important factors in determining this question, the parties, in the absence of an express stipulation on the subject, being supposed to contract with reference thereto.[2] The determination of the question, as to what is good husbandry, [*127] *may, perhaps, also be affected by varying conditions as to situation, soil, climate, etc.; but in the absence of the above specified local causes, or special contracts on the subject varying the application of the foregoing rules on the subject of the right to manure as between landlord and tenant, such rules are believed to be a correct exposition of the law on this subject.[3]

III. Fixtures set up for the Purposes of Ornament or Convenience, or for Domestic Use.

Domestic fixtures have been defined by Mr. Gibbon to be "those articles which a tenant fixes in his dwelling house, in order to render his occupation more comfortable or more convenient;"[4] and have been divided by the same author into two classes: those which are useful and those which are ornamental.[5] This definition, while correct in its terms so far as it extends, does not seem sufficiently comprehensive to include all the cases

by made, so far as it was not commingled with the soil, provided he exercised the right with such care and skill as to prevent injury to the land. [See Gardner v. Perry, 39 Can. Law J., 670 (Ont., 1903).]

[2] See Middlebrook v. Corwin, 15 Wend., 170 (1836); Ruckman v. Outwater, 28 N. J. L., 587 (1860); Roberts v. Barker, 1 Cr. & M., 808 (1833); s. c., 3 Tyrwh., 945.

[3] See, on the subject of the influence of custom, Wigglesworth v. Dallison, Doug., 201 (1779); Webb v. Plummer, 2 B. & Ald., 746 (1819); Roberts v. Barker, 1 Cr. & M., 808 (1833); s. c., 3 Tyrwh., 945; 1 Smith's Lead. Cas., 670, *et seq.*

[4] Gibb. Fixt., 32.

[5] Gibb. Fixt., 33.

usually classed under this head; and the subject is usually understood to include annexations (other than trade or agricultural fixtures) made by a tenant to his dwelling house or other demised premises, for the purpose of ornament or to render his occupation of the premises more convenient.[6]

The grounds upon which fixtures of this class are allowed to be removed by the tenant during his term, are that they are annexed by him for the temporary purpose of ornament or convenience only, while he occupies the premises, and are not intended as a permanent accession to the realty.[7] Any rule that a mere temporary attachment to the freehold would in all *cases have the effect of changing the title of such ar- [*128] ticles of ornament or convenience (which often are of no utility without such annexation) would work the greatest hardship and inconvenience to tenants, and would be productive of no real benefit to the landlords themselves.

It may be here observed that the exception in favor of the tenant's right of removing fixtures, as against his landlord, is not so liberally applied in this class of cases, as in the case of trade fixtures,[8] not only on account of the absence of the strong grounds of public policy before alluded to, but, perhaps, also because the purpose for which trade fixtures are made, their value as compared with the realty, etc., furnish additional and greater evidence of intention not to make their annexation permanent.

In order to determine whether in any particular case annexations are removable by the tenant, as coming within this class of fixtures, a variety of considerations are to be regarded. The mode of annexation of the articles in question, and the extent to which they are united, whether they can be taken down and

[6] See Wall v. Hinds, 4 Gray, 271 (1855); Ferard Fixt., 71; Hill Fixt., § 29; Grady Fixt., 30, 85.

[This definition would seem to be applicable to an office room as to a dwelling-house. Hayford v. Wentworth, 97 Me., 347, 353 (1903).]

[7] See Gibson v. Hammersmith, &c., Railway Co., 2 Dr. & Sm., 609 (1862); Seeger v. Pettit, 77 Penn. St., 440 (1875); Ferard Fixt., 83.

[8] Whitehead v. Bennett, 27 L. J. (N. S.), Ch., 475 (1858); s. c., 6 W. R., 351; Van Ness v. Pacard, 2 Pet., 143 (1829); 2 Kent Com., 345. [See, *ante*, p. *90, and Allan v. Rowe, 1 N. Brunsw. Eq. (Trueman), 41, 45 (1894). But see Hayford v. Wentworth, 97 Me., 347, 349 (1903).]

removed *integre, salve et commode,* without substantial injury to the realty or to themselves, and the purposes which they were designed to answer, are important as tending to throw light upon the intention with which they were annexed, the main question being whether they were intended for a permanent accession to the realty, *perpetui usus causa,* or *pur un profit del' enheritance,* or whether they were put up and used for a temporary object, or for the more convenient occupation and enjoyment of the premises for the particular purposes for which they were used, so that they were useful, and necessary, rather, to the comfortable and convenient occupation of the building, than to the building itself.[9]

Permanent additions to the estate, so united to the house as materially to impair it if removed, or so firmly annexed to the estate as to be incapable of removal without receiving [*129] *substantial injury or destruction themselves, may not be removed by the tenant, though annexed by him at his own expense, and for purposes of ornament or convenience.[10] In such

[9] See Wall v. Hinds, 4 Gray, 271 (1855); also, Bircher v. Parker, 40 Mo., 120 (1867).

[10] 2 Kent Com., 344. Buckland v. Butterfield, 2 Brod. & B., 54 (1820), is a good example of the doctrine above stated. In this case a conservatory was purchased by a tenant for years (who also had a remainder for life, after the death of the lessor, his mother), and brought from a distance and erected upon a brick foundation fifteen inches deep; upon that was bedded a sill, over which was frame-work covered with slate; the frame-work was eight or nine feet high at the end, and about two feet in front. This conservatory was attached to the dwelling house by eight cantalivers let nine inches into the wall, which cantalivers supported the rafters of the conservatory. Resting on the cantalivers was a balcony with iron rails. The conservatory was constructed with sliding glasses, paved with Portland stone, and connected with the parlor chimney by a flue. Two windows were opened from the dwelling house into the conservatory, one out of the dining-room, another out of the library. A folding-door was also opened into the balcony; so that when the conservatory was pulled down by the assignees in bankruptcy of the tenant, that side of the house to which it had been attached became exposed to the weather. *Held,* that the conservatory in question was a part of the freehold, and for its removal an action on the case in the nature of waste lay. The annexation in this case seems to have been made an integral and essential part of the dwelling, and was undoubtedly intended to be permanent.

In Jenkins v. Gething, 2 John. & Hem., 520 (1862), the buildings were somewhat similar to those in Buckland v. Butterfield, which was followed

as furnishing the rule of decision. The buildings in this case were (1) a green-house and hot-house forming one building, standing on foundation walls built into the ground, to which the upper frame-work was attached in the usual way by a course of mortar; there was a dividing wall of brick between the green-house and hot-house; (2) a green-house or nursery similarly constructed; (3) various pits formed by wooden frame-work affixed with mortar to low brick foundations in the same way as the green-houses; (4) a boiler built into the floor of the green-house, with a system of heating-pipes connected with it by screws. *Held,* that they were all irremovable fixtures except the heating-pipes, which were likened to gas-fittings, and were said hardly to be considered as adjuncts of the boiler, and hence removable.

[A conservatory, green-house and hot-house are not removable, but the boilers, pipes and zinc troughs for heating the same, are. Gardiner v. Parker, 18 Gr. Ch., 26 (Ont., 1871).]

[In Ferguson v. Paul (1885), 22 Scot. Law Rep., 809, a right to remove very substantial green-houses was implied from the fact that the lease required the tenant to replace any trees removed by him, and the tenant had removed a number of fruit trees to erect the green-houses, which could not be replaced without removing the green-houses.]

In a case where issue was joined upon an allegation in the plaintiff's replication, that a cornice was "fixed and plastered to the wall of the said room, and, before the time when the same was so pulled down and removed, had become, and was at that time affixed to the freehold of the dwelling house, and was not at the time when the same was so pulled down and removed, removable by law and of right by the defendant as such tenant, etc.," the defendant having alleged that the cornice was a wooden cornice, put up by him with screws, only for the purpose of ornament, and by him whilst in occupation of the premises, carefully and skillfully unscrewed and removed, etc., the judge desired the jury to say "whether the cornice was merely a matter of ornament, fixed during the tenancy, capable of removal without doing substantial injury to the freehold, and so removed in fact during the tenancy; and said that in that case their verdict should be for the defendant," it was *held* (the jury having found for the plaintiff), to be no misdirection. Avery v. Cheslyn, 3 Ad. & E., 75 (1835).

See, also, Tayl. Land. & T., § 550; 2 Smith's Lead. Cas., 258, *et seq.;* 1 Wash. Real. Prop., 114; Whiting v. Brastow, 4 Pick., 310 (1826); Stockwell v. Marks, 17 Me., 455 (1840), where a furnace had been erected by a tenant for warming the house, thereby making a material alteration of the building in many parts of its interior arrangement; Powell v. McAshan, 28 Mo., 70 (1859). [See Rooney v. Stearns, 17 N. Y. Weekly Dig., 322, 323 (1883).]

[Elevators, steam plant, radiators, plate glass, marble staircase, and marble wainscoting are not removable. Palmer v. Young, 108 Ill. App., 252, 257 (1903).]

[A house belonging to a landlord, moved by a tenant and permanently

[*130] *a case the permanent nature of the annexation and the fact that it cannot be removed without substantial injury to the house, or to itself, ordinarily affords satisfactory evidence of an intention to make the annexation a permanent accession to the realty. No general rule, however, can be laid down for the decision of all cases, but every case must depend on its special and peculiar circumstances,[1] the question in each case being a mixed one of law and fact.[2] An ordinary and clear application of the principle above stated, is made in the case of glass fixed by a tenant in the windows of the demised premises. "If glasse windows (tho' glased by the tenant himselfe), be broken down, or carried away, it is wast, for the glasse is part of his house."[3] The same rule has been applied to the outer door and cheek posts of a house, added by a tenant dur-

affixed to the leased farm, does not cease to be the landlord's property, and is a part of the real estate; and permanent improvements to the house, made by the tenant, are also a part of the real estate, and title thereto vested in the landlord as soon as made, and a mechanics' lien can only attach to the leasehold interest. Moore v. Vaughn, 42 Neb., 696, 700 (1894).]

[1] Per Dallas, C. J., in Buckland v. Butterfield, 2 Brod. & B., 54, 58 (1820). See, also, *ante*, p. *24.

[2] See *ante*, p. *24; Avery v. Cheslyn, 3 Ad. & E., 75 (1835); Leach v. Thomas, 7 C. & P., 327 (1835). [Hayford v. Wentworth, 97 Me., 347, 351 (1903).]

[3] Co. Lit., 53 a; Herlakenden's Case, 4 Co., 63 b (1589); Warner v. Fleetwood (1599), cited in Herlakenden's Case. See, also, Moore, 178. Where the landlord lent the tenant a window to be put into a temporary partition, and the tenant, excepting the window, sold the fixtures to the next tenant, it was *held*, that the window was the property of the landlord, who could maintain trover for it. Loveridge v. Schultz, Gen. Term, June, 1857. Supr. Ct. of Buffalo, 2 Clint. Dig., p. 1415, pl. 43. Whether windows, placed by a tenant at will in a demised house and fitted to their places, may be removed by the tenant, *quaere*. State v. Elliot, 11 N. H., 543 (1841). [See Harrison v. Smith, 19 Nova S., 516 (1887).]

[Where a tenant finds no sash in two windows when he goes into occupancy of the house, and borrows sash which he fastens by a strip held by shingle nails driven about half up into the wood, can he remove such sash just before the expiration of his lease, for the purpose of returning them to the lender, *quaere*. State v. Whitener, 93 N. C., 590, 594 (1885).]

[In Gardiner v. Parker, 18 Gr. Ch., 26, 30 (Ont., 1871), it was said that if a conservatory, green-house and hot-house were not removable the

ing his tenancy.[4] The true distinction seems, as stated in *Poole's Case,[5] to be whether the annexation was or was [*131] not made to complete the house; if made to complete the house, or, in other words, as a permanent accession thereto, it may not be removed. The application of the rule to hearths and chimney-pieces (stated in that case not to be removable), has, however, since been disapproved; and it is now quite generally considered that ornamental[6] chimney pieces put up by a tenant, are removable by him during his term, and this is said to be no injury to the landlord, for the tenant leaves the premises in the same state in which he found them, and the tenant is benefited.[7] The removal of such articles may doubtless be justified on the ground of their being considered as a sort of

glass roofs were not, although they were formed by panes resting upon the rafters, and easily taken out without injuring the framework. The rule as to windows was held to apply.]

[4] Cook's Case, Moore, 177 (1582); a distinction was, however, made in this case between inner and outer doors, the former being considered as removable, as being less necessary to the house, while the latter were considered necessary as a defense to the frank tenement. See State v. Elliot, 11 N. H., 543 (1841).

[5] 1 Salk., 368 (1703).

[6] In Leach v. Thomas, 7 C. & P., 327 (1835), it was *held,* that an outgoing tenant might remove an ornamental chimney-piece, put up by him during the tenancy, but not a chimney-piece which was not ornamental. Patterson, J.: "With respect to the chimney-piece, the only question is, whether it was an ornamental chimney-piece or not," and whether ornamental or not was left to the jury.

This distinction between chimney-pieces that are ornamental and those that are not so, has since been confirmed by the Court of Exchequer Chamber, in Bishop v. Elliot, 11 Exch., 113 (1855); s. c., 1 Jur. (N. S.), 962; 24 L. J. (N. S.), Exch., 229, where the cases on the subject are fully considered. See the same case in the Court of Exchequer, reported in 10 Exch., 496; 24 L. J. (N. S.), Exch., 33. A fire-frame, fixed in a common fire-place, with brick laid in between the sides of the frame and the jambs of the fire-place, the facing being plastered over, is a removable fixture. Gaffield v. Hapgood, 17 Pick., 192 (1835).

[7] Per Lord Mansfield, in Lawton v. Salmon, 1 H. Bl., 259, note (1782); s. c., 3 Atk., 16, note; per Lord Hardwicke, in *Ex parte* Quincy, 1 Atk., 477 (1750); Dudley v. Warde, 1 Ambl., 113 (1751), per Dallas, C. J., in Buckland v. Butterfield, 2 Brod. & B., 58 (1820); per Lord Ellenborough, in Elwes v. Maw, 3 East, 38 (1802); Bishop v. Elliot, 11 Exch., 113 (1855); s. c., 1 Jur. (N. S.), 962; 24 L. J. (N. S.), Exch., 229.

furniture,[8] removable without injury to the premises. It was said by Lord Hardwicke, in Lawton v. Lawton,[9] that wainscot, [*132] *fixed only by screws, might be removed by a tenant during his term; and subsequently in *Ex parte* Quincy,[10] he affirmed its removability, without any qualification as to the manner of annexation, though he stated that this was a very strong case. It is, however, affirmed by Lord Coke, that wainscot annexed or fixed to the house by a tenant, is not removable;[11] and unless evidently fixed for a temporary purpose, such would seem to be the better opinion, though the question would properly be one of fact upon the intention of the tenant to make a permanent annexation, and hence properly belong to the jury under proper instructions as to the law from the court.[12] The same remark will apply to many of the earlier cases of annexations, about which there has been such a difference of opinion among courts and writers, though there are many cases so clearly upon the one side or the other of this disputed line, that a jury ought to find no difficulty, and indeed it would be their duty, under the instruction of the court, to find such articles irremovable or removable, according to which side of said line of dispute the case in question lies; and in such cases, cases upon the subject already decided might perhaps throw some light upon the question, though even then the difference seems to be one of degree rather than of principle. In the earlier cases, the question of removability seems often to have been decided as one of pure law for the court; this is believed to be erroneous (except, perhaps, in cases where there is no dispute about the facts), and to have been one of the fruitful causes of the contrariety and contradiction to be found in the decided cases on the subject of fixtures.

[8] See *post*, where this sort of annexation is further considered.

[9] 3 Atk., 15 (1743). See, also, Elwes v. Maw, 3 East, 38 (1802); Lee v. Risdon, 7 Taunt., 191 (1816); Buckland v. Butterfield, 2 Brod. & B., 58 (1820).

[10] 1 Atk., 477 (1750). See, also, Bridgeman's Case, 1 Roll. Rep., 216, pl. 14 (1615).

[11] Co. Lit., 53 a; Herlakenden's Case, 4 Co., 64 a (1589). [See Palmer v. Young, 108 Ill. App., 252, 257 (1903).]

[12] When fixed with screws for a temporary purpose, it may doubtless be removed. See cases cited, *supra*, note 9.

No two cases can be found exactly similar in their facts, and to endeavor to place the doctrine of *stare decisis*, as regards this subject, so entirely upon the basis of similarity in the method of annexation, as seems to have been done by many judges and writers, can only lead to increased uncertainty and *contradiction. The only way out of the present con- [*133] fusion on this subject, seems to be to adhere more closely to the maxim *ad quaestionem facti non respondent judices, ad questionem legis non respondent juratores,*[13] and to leave the questions of fact in cases at law, as to the intention of the tenant in making the annexation, whether to make a permanent accession to the realty, or for the mere temporary purposes of ornament, etc., to be determined by the jury, who may, in determining that question, resort to all the lights to be derived from the relation of the parties, the mode and extent of the annexation, whether removable without injury to the realty, etc., and who should, in making such investigation, act under instructions from the court as to the policy of the law respecting the particular relation existing between the parties, and such other general rules of law as are applicable to the question.

Without the aid of a special contract, the law imposes no obligation on the landlord to pay his tenant for buildings erected on the demised premises. The innovation upon the common law rule that all buildings become a part of the freehold, has extended no further than the right of removal while the tenant is in possession, and has never been extended to give a right of action against the landlord for their value.[14] We have already seen that houses built by a tenant solely or principally

[13] Broom Leg. Max., 99.

[14] Kutter v. Smith, 2 Wall., 491 (1864). See C. C. La. Art., 2697, and the cases cited *post*, in this chapter. [Jones v. Hoard, 59 Ark., 42 (1894); Gocio v. Day, 51 Ark., 46, 48 (1888); Mull v. Graham, 7 Ind. App., 561, 562 (1893); Mullen v. Pugh, 16 Ind. App., 337, 340 (1896); Gudgell v. Duvall, 27 Ky., 229, 230 (1830); Guthrie v. Guthrie, 78 S. W., 474 (Ky., 1904); Kenerson v. Colgan, 164 Mass., 166, 168 (1895); McAllister v. Reel, 59 Mo. App., 70, 74 (1894); Wilson v. Scruggs, 75 Tenn., 635, 640 (1881); Hintze v. Krabbenschmidt, 44 S. W., 38, 40 (Tex. Civ. App., 1897); Yates v. Bachley, 33 Wis., 185; see, also, Goedeke v. Baker, 28 S. W., 1039 (Tex. Civ. App., 1894).]

[Necessary improvements made by a tenant upon a hotel, can not be recovered; and the fact that the landlord witnessed the making of them

for purposes of trade, are removable by him during the term, as trade fixtures. With reference, however, to houses built and used exclusively or principally for the purpose of dwellings, or merely with a view of adding to the yearly value or income of the land, a distinction has very properly been made. Though dwellings are great conveniences and even necessities to enable men of all classes to enjoy the fruits of their labor and trade, they are intended for purposes of habitation, and are equally necessary to the farmer, tradesman, and gentleman of leisure who follows no occupation. Such structures when built by a tenant solely or principally for purposes of [*134] *habitation, or merely with the view of adding to the yearly value or income of the land, and not for the furtherance of the trade or business of the lessee, unless so temporarily constructed and attached to the soil as to show plainly an intention that they should retain their chattel nature and remain the property of the tenant,[1] are to be presumed to have been erected *perpetui usus causa*, and are not removable even by a tenant for years, without the landlord's permission.[2] And if nothing ap-

does not raise an implication of a promise to pay for them. Woolley v. Osborne, 39 N. J. Eq., 54, 59 (1884).]

[Where a lessee, under an erroneous impression, arising from a misconstruction of his contract, that he has leased land during the life of his lessor, erects barns, houses, and makes other extensive improvements, he can not, upon a termination of his lease by the landlord, have compensation therefor; nor is the rule modified by the fact that the lessor remained quiet while the lessee was thus expending his money. Dunn v. Bagby, 88 N. C., 91 (1883).]

[Where the lessee is evicted by a paramount title, he can not recover the value of his improvements from his lessor, where the lease was made in good faith, although there was a covenant that the lessee should erect improvements, but no agreement that the lessor was to pay therefor, and although the lessor has set off the value of the improvements to the claim for mesne profits. Lanigan v. Kille, 97 Pa. St., 120 (1881).]

[1] As in Farant v. Farant, 2 Wash. Law Rep., 137 (1875), Supr. Ct. D. C., where the wooden dwelling stood on blocks or rollers, and was not fastened to the ground, being so built for the purpose of removal if necessary. See, also, Krounse v. Ross, 1 Cranch C. C., 368 (1806). [Nigro v. Hatch, 2 Ariz., 144 (1886); Robinson v. Wright, 9 D. C., 54, 56 (1875); Shaw v. Shaw, 59 Ill. App., 264 (1894); see, also, Meyer v. O'Dell, 18 Tex. Civ. App., 210 (1898).]

[2] Cannon v. Hare, 1 Tenn. Ch., 22, 36 (1872). See the cases cited, *ante*, p. *66, chap. 3. In Cannon v. Hare, the lessee of a dowress erected on a

city lot a row of buildings, framed in the shop, each part marked for its particular position, and raised without framing on a brick foundation wall, with brick chimneys and composition roof entire, and rented the lower rooms for stores, and the upper rooms for bed-rooms, and it was *held,* that these buildings passed on the death of the dowress to the remaindermen, and that the lessee was neither entitled to remove them nor to compensation for their value. See, also, 1 South. Law Rev. (1872), 246; Ombony v. Jones, 19 N. Y., 234, 240 (1859). In this case Comstock, J., in delivering the opinion of the court, said: "In a somewhat recent case in the Supreme Court of this State, it was stated by an able judge, 'that any person who has a temporary interest in land, and who makes additions to, or improvements upon it, for the purpose of better use and enjoyment of it while such temporary interest continues, may, at any time before his right of enjoyment expires, rightfully remove such additions and improvements.' (King v. Wilcomb, 7 Barb., 266; Dubois v. Kelly, 10 Id., 500). The rule, as thus stated, is, I think, laid down somewhat too broadly. The adjudged cases, I am confident, do not sustain a doctrine so general. On the contrary, the general maxim of the law is, that whatever is fixed to the realty becomes a part of it, and partakes of all its incidents and properties. This is the rule even in the relation of landlord and tenant. Many exceptions have been engrafted upon it, but the rule itself has not been reversed, and therefore, it must not be lost sight of. (Ferard on Fixtures, 8)." * * * * "A building is, in its very nature, an annexation to land, and it becomes a chattel only by the application of some exceptional rule." The building in this case, a ball-room erected by the lessee of an inn, was held to come within the exception as to trade fixtures. See, also, Kissam v. Barclay, 17 Abb. Pr., 360 (1864); Schlemmer v. North, 32 Mo., 206 (1862); Hob., 234; Year Book, 17 Ed. 2, 518 (1324).

In Reid v. Kirk, 12 Rich. Law, 54 (1859), a summer-house built by a tenant in the usual way of building a dwelling, and occupied as a dwelling house for nearly thirty years, was held not to be removable, as against the owner of the fee. Whitner, J.: "Everything which is annexed to the freehold becomes part of the realty, and can only be severed from it and reinvested with the character of personal property by the act of the owner of the land, and the rule applies not only to houses and other structures which are permanent in themselves, but to every chattel which is actually and substantially affixed to the freehold. Whenever these rules apply, an exception must rest upon some reasonable and sensible distinction. This we think has not been shown in the present instance."

So, in Van Ness v. Pacard, 2 Pet., 137, 147 (1829), per Story, J.: "Then as to the residence of the family in the house, this resolves itself into the same consideration. If the house were built principally for a dwelling house for the family, independently of carrying on the trade, then it would doubtless be deemed a fixture, falling under the general rule, and immovable." See, also, 17 Edw. 2, 518 (1324); 3 Mason C. C., 465; McCullough v. Irvine, 13 Penn. St., 438 (1850); Haflick v. Stober,

11 Ohio St., 482 (1860); Austin v. Stevens, 24 Me., 520 (1845); Kutter v. Smith, 2 Wall., 491 (1864); Doak v. Wiswell, 38 Me., 569 (1854); Marable v. Jordan, 5 Humph., 417 (1844); Shepard v. Spaulding, 4 Met., 416 (1842); Darcy v. Askwith, Hob., 234 (1618).

In Kissam v. Barclay, 17 Abb. Pr., 360 (1864), a three-story brick building erected by a tenant on premises leased for a term of years, there being no provision in the lease for its removal, and the building not being erected for purposes of trade, was held to be a part of the realty. The tenant not being entitled to remove it at the end of his term, but only to the use of it, his mortgagee was held not entitled to payment of his mortgage out of money awarded to the owner of the land for damages to the land and house.

The doctrine above advanced in King v. Wilcomb, and Dubois v. Kelly, has, however, been approved by some able writers, and has some support from certain *dicta* of judges. The American editors of Smith's Leading Cases (2 Smith's Lead. Cas., 258), referring to the subject, say: "The decisions will, perhaps, finally establish that every addition or improvement made by a tenant which can be severed without placing the freehold in a worse condition than it was when the term began, may be removed at or before its termination, without regard to the cause or motive that led to the erection." * * * "The privilege of the tenant seems at one time to have been limited to fixtures erected for the benefit of trade, but it now embraces additions to the freehold made for ornament, pleasure or convenience (*ante,* *192), and may extend to structures, or even buildings of a durable and substantial kind, if so constructed that they can be taken away without serious or irreparable injury to themselves, or the premises of which they form a part. Van Ness v. Pacard, 2 Peters, 137; Grymes v. Bowerin, 6 Bing., 437; Martin v. Roe, 7 Ellis and Bl., 237." See, also, *dicta* in Whiting v. Brastow, 4 Pick., 310 (1826); Taylor v. Townsend, 8 Mass., 416 (1812); Washburn v. Sproat, 16 Mass., 449 (1820); 1 Wash. Real Prop., 114; Bircher v. Parker, 40 Mo., 120 (1867); s. c., 43 Mo., 443 (1869); Cromie v. Hoover, 40 Ind., 57 (1872). The case of Martin v. Roe, above cited, seems to have been decided upon principles peculiar to the law of dilapidation, to be hereafter explained; and the general doctrine is believed to be as stated in the text.

In Louisiana, by Art. 2697, C. C., the lessee has a right to remove the improvements and additions which he has made to the thing let, provided he leaves it in the state in which he received it; but if these additions be made with lime and cement, the lessor may retain them on paying a fair price. See Pecoul v. Auge, 18 La. Ann., 614 (1866); Sigur v. Lloyd, 1 Id., 421 (1846); Pellenz v. Bullerdieck, 13 Id., 274 (1858); Talley v. Alexander, 10 Id., 627 (1855); Blache v. Aleix, 15 Id., 50 (1860); Sewall v. Duplessis, 2 Rob., 66 (1842).

[A servant's room attached to the main body of the building, galvanized iron gutters attached to the roof, iron water-pipes underground, a cement walk, flowers, a fountain, and plumbing fixtures are not removable. Wright v. DuBignon, 114 Ga., 765 (1901).]

pears *as respects the purpose for which buildings are [*135] erected by a tenant on the demised premises, or the manner in which they are connected with the freehold, bringing them within any *exception to the general rule on the subject, they [*136] are presumed to be a part of the realty, and do not belong to the tenant.[1] The tenant is, however, entitled to their use during the term, and if such buildings are torn down by the landlord before the end of the term, the measure of the tenant's damages

[A two-story frame addition, twenty by twenty-four, placed upon wooden posts set in the ground, and nailed to the old building, one side of which was changed so as to make it, with the addition, one structure, and the roofs of the original building and of the addition being connected, can not be removed by a tenant. Friedlander v. Ryder, 30 Neb., 783 (1890).]

[A kitchen, partly stone and partly frame, securely fastened to the main building, a frame building, twenty-four by sixty-two, resting upon stone walls, erected by a tenant who expected to buy the property, or remain there as long as he lived, can not be removed by him, however great the hardship. Carver v. Gough, 153 Pa. St., 225 (1893).]

[A dwelling-house, stables, etc., are not trade fixtures, although they might be removed without injury to the premises. Johnson v. Willinghby, 3 Tenn. Cas. (Shannon), 338 (1875).]

[For other cases holding that a building erected by a tenant is presumed to be a permanent annexation, see Board of Education v. Grant, 118 Cal., 39, 41 (1897); Marks v. Ryan, 63 Cal., 107, 111 (1883); Mueller v. Chicago, M. & St. P. R'y Co., 111 Wis., 300 (1901); Allan v. Rowe, 1 N. Brunsw. Eq. (Trueman), 41, 51 (1894); see, also, *ante*, p. *62, and Kenerson v. Colgan, 164 Mass., 166 (1895); *Re* Allen, 31 Ont., 335, 338 (1900); Harrison v. Smith, 19 Nova S., 516 (1887).]

[1] Schlemmer v. North, 32 Mo., 206 (1862). See, also, the cases cited in the preceding note; Howard v. Fessenden, 14 Allen, 128 (1867); Madigan v. McCarthy, 108 Mass., 377 (1871); Fisher v. Saffer, 1 E. D. Smith, 611 (1852). [Dougherty v. Spencer, 23 Ill. App., 357, 360 (1887); Griffin v. Ransdell, 71 Ind., 440, 442 (1880); Wheeler & Wilson Co. v. Hasbrouck, 68 Iowa, 554 (1886); Docking v. Frazell, 38 Kan., 420, 423 (1888); 34 Kan., 29, 33 (1885); Stevens v. Burnham, 62 Neb., 672, 673 (1901); Bohl v. Brown, 2 Tex. Ct. App., Civ., § 541 (1885); Fitzgerald v. Anderson, 81 Wis., 341, 343 (1892); Gray v. McLennan, 3 Man., 337, 340 (1886); see, also, *ante*, p. *66.]

[The fact that a tenant, with the approval of his landlord, insures, in his own name, buildings erected by him, does not affect the question as to whether they are fixtures, as the landlord might be willing to allow him to draw the insurance money, in case of their destruction by fire, to enable him to rebuild. Carver v. Gough, 153 Pa. St., 225, 229 (1893).]

is the value of the rent from the time they were demolished till the end of the term.[2]

The instances where fixtures of the class under consideration in this section have been allowed to be removed by the tenant for years as against his landlord, are quite numerous. There are much confusion and obscurity in the early authorities on this subject; and as many of them proceed upon distinctions as to the method of attachment, etc. (as in the case of the furnace in Day v. Austin[3]), which are not untenable, no useful purpose would be subserved by considering them at length. They will, however, be found referred to in the notes.[4]

[*137] *Further instances of articles that have been held removable by the tenant during his term will be found in the note below.[5]

[2] Schlemmer v. North, 32 Mo., 206 (1862). See, also, Kissam v. Barclay, 17 Abb. Pr., 360 (1864).

[Where buildings erected by a tenant are the property of the landlord, the measure of the tenant's compensation, in condemnation proceedings, is the value of the leasehold including the use only of such buildings. Corrigan v. Chicago, 144 Ill., 537, 551 (1893).]

[3] Owen, 70 (1598); s. c., under the style Day v. Disbitch, Cro. Eliz., 374, where it was "agreed that a furnace fixed *in medio domus* is but a chattel, and is removable; but otherwise it is, being fixed to the walls." See, also, 42 Edw. 3, pl. 6; 20 Hen. 7, 13; 21 Hen. 7, 26; Squier v. Mayer, 2 Freem. Ch., 249 (1701); s. c., 2 Eq. Ca. Abr., 430.

[4] See the cases of tables dormant, furnaces, benches, etc., considered in 8 Hen. 7, 12 (1493); 20 Hen. 7, 13 b (1504); 21 Hen. 7, 26 b (1505); Day v. Austin, Owen, 70 (1595); s. c., Cro. Eliz., 374; Bro. Abr., Chattels, pl. 7, 11; Id. Waste pl., 104; Squier v. Mayer, 2 Freem. Ch., 249 (1701); 2 Eq. Ca. Abr., 430.

See, also, Co. Lit., 53 a, where wainscot, benches and furnaces are declared to be irremovable by a tenant; also, generally, Keilw., 88; Noy's Max. (9th ed.), 167.

All these articles if annexed for the temporary domestic use and convenience of the tenant, and capable of removal without substantial injury to the realty, would doubtless now be allowed to be removed by the tenant.

[5] Arras and hangings have been held removable by the tenant. Bridgeman's Case, 1 Roll. Rep., 216, pl. 14 (1615). See, also, Squier v. Mayer, 2 Freem. Ch., 249 (1701); s. c., 2 Eq. Ca. Abr., 430, furnace and hangings; Beck v. Rebow, 1 P. Wms., 94 (1706).

So, as to pump put in a well for domestic convenience, and fastened to a platform which was also nailed down. McCracken v. Hall, 7 Ind., 30 (1855); s. p., Grymes v. Bowerin, 6 Bing., 437 (1830); s. c., 4 M. & P., 143; 8 L. J. C. P., 140.

IV. When the Right of Removing Fixtures must be Exercised.[6]

The general rule of law being, as has already been seen, "*quicquid solo plantatur, solo cedit*," and the right of the *tenant as against his landlord being only the right of [*138] user during the term, and to remove during his term the fixtures he may have put up, and so make them to cease to be any longer fixtures,[7] it becomes a very material inquiry to ascertain, if possible, the precise limits of the period within which this right may be exercised. From a very early period it has been generally considered that this right of a tenant for years must be exercised during the continuance of his term, but not after the expiration thereof; and the rule is quite generally so stated

So, as to a gasometer and gas fixtures. Hays v. Doane, 11 N. J. Eq., 84 (1855). [L'Hote v. Fulham, 51 La. Ann., 780, 787 (1899); see, also, *post*, p. *299.]

So, as to grates, stoves, etc. Lee v. Risdon, 7 Taunt., 191 (1816), per Gibbs, C. J.; Rex v. St. Dunstan, 4 B. & C., 686 (1825), per Bayley, J.

So, as to a cupboard standing on the ground supported by holdfasts. Rex v. St. Dunstan (*supra*), per Bayley, J.

[So, as to a "wash-down syphon water closet" in an office. Hayford v. Wentworth, 97 Me., 347 (1903).]

[See Carlin v. Ritter, 68 Md., 478, 491 (1888), as to a bake-house and oven, a fountain in the yard, a furnace in the cellar, laundry tubs, grates, inside shutters, office-counter, shelving, mirrors fastened in panels in the wall of the bar-room, and inside iron stable-doors upon hotel premises.]

[A tenant may remove gravel from garden walks, and wooden steps for gaining access to terraces, but not ornamental shrubs and turf. Burns v. Fleming (1880), 8 Sess. Cas., 4th Ser., 226.]

But a tenant, not a gardener, cannot, during or after his term, remove a border of box planted on the demised premises by himself, unless by special agreement with the landlord. Empson v. Soden, 4 B. & Ad., 655 (1833); s. c., 1 N. & M., 720.

See, also, the cases cited in the chapters considering the relations of Executor and Heir, etc., which upon the principle already considered (*ante*, p. *90) may be considered as authorities in this relation also. [And see, *post*, p. *149.]

[6] In this section the effect of special agreements upon the right of removal will not be considered, but only cases where there has been no contract affecting the question.

[7] See Minshall v. Lloyd, 2 M. & W., 450 (1837), and the cases cited *ante*, p. *77.

in the books.[8] We find it clearly stated in the Year Book, 20 Hen. 7, 13 b, pl. 24 (1504): "And if a lessee for years make such a furnace for his advantage, or a dyer makes his vats and vessels to carry on his occupation during his term,[9] he may remove them; but if he suffer them to remain fixed to the earth after the end of his term, then they belong to the lessor."

The ground of the rule has been stated to be a presumed abandonment or gift in law to him in reversion, arising from leaving the fixtures annexed to the freehold after the expira- [*139] *tion of the term;[10] but this ground does not seem entirely satisfactory, and it seems more proper to state that by

[8] See Poole's Case, 1 Salk., 368 (1703); s. c., Holt, 65, per Holt, C. J.: "That during the term the soap-boiler might well remove the fats," etc. "But after the term they become a gift in law to him in reversion, and are not removable"; *Ex parte* Quincy, 1 Atk., 477 (1750); Dudley v. Warde, 1 Ambl., 113 (1751); Minshall v. Lloyd, 2 M. & W., 450 (1837); Pugh v. Arton, L. R. 8 Eq., 626 (1869); s. c., 38 L. J. (N. S.), Chanc., 619; 20 L. T. (N. S.), 865; 17 W. R., 984; *Ex parte* Reynal, 2 M. D. & DeG., 461 (1841); Gaffield v. Hapgood, 17 Pick., 192 (1835); Moore v. Smith, 24 Ill., 512 (1860); s. c., 26 Ill., 392; Stockwell v. Marks, 17 Me., 455 (1840); Heffner v. Lewis, 73 Penn. St., 302 (1873); Davis v. Buffum, 51 Me., 160 (1863); Dingley v. Buffum, 57 Me., 381 (1869); Davis v. Moss, 38 Penn. St., 346 (1861); Overton v. Williston, 31 Penn. St., 155 (1858); Preston v. Briggs, 16 Vt., 129 (1844). [Griffin v. Ransdell, 71 Ind., 440, 443 (1880); London Loan Co. v. Pulford, 8 Ont. Pr., 150, 153 (1879); see, also, Bonney v. Foss, 62 Me., 248 (1873).]

[9] The clause "during his term" probably more properly relates to the words "to carry on his occupation." It is translated by some as referring to those words, and by others as referring to the word "remove." The punctuation of the text seems to indicate that the former is the correct reading. The original text is "*pur occupier son occupation durant le t'me, il peut remuer eux: mes s'il souff'r eux e'e fixez al' terre apres le fin del' t'me, donq ils appent al lessor.*" Whichever may be deemed to be the correct translation, the concluding sentence renders the sense sufficiently apparent. See, also, 21 Hen. 7, 26 b, pl. 4 (1505).

[10] See Poole's Case, 1 Salk., 368 (1703); s. c., Holt, 65; Lyde v. Russell, 1 B. & Ad., 394 (1830); Ombony v. Jones, 19 N. Y., 238 (1859); Northern Cent. R. R. Co. v. Canton Co., 30 Md., 355 (1868); McCracken v. Hall, 7 Ind., 30 (1855). It was accordingly *held*, in Penton v. Robart, 2 East, 88 (1801), that the presumption of abandonment could not arise so long as the tenant remained in possession, though after the expiration of the term, and though as a trespasser. See, however, the pages immediately following. [Sweet v. Myers, 3 S. Dak., 324, 329 (1892); *Ex parte* Brook (1878), 10 Ch. D., 100, 109.]

their annexation the tenant's fixtures became a part of the freehold subject to the right of the tenant during his term to remove them and make them again chattels, and that unless so removed they belong to the landlord.[11] The right of the tenant to remove his fixtures after the expiration of his term may, however, be reserved to him by oral agreement with the landlord.[12]

The cases quite generally agree, that in the absence of a contract giving that right, the right of removal of fixtures, properly so called, cannot be exercised either by the tenant or his vendee after the expiration of the term and surrender of possession of the premises by the tenant.[13] There are, however,

[11] See Gibson v. Hammersmith R'w'y Co., 2 Drew & Sm., 610 (1862); Leader v. Homewood, 5 C. B. (N. S.), 546 (1858). [See Jackson v. Klinger, 67 N. Y. Supp., 850, 851 (1900).]

[12] McCracken v. Hall, 7 Ind., 30 (1855); see *post* as to the effect of agreements respecting the right of removing fixtures.

[See Duffus v. Bangs, 122 N. Y., 423, 427 (1890), as to nursery stock.]

[In Josslyn v. McCabe, 46 Wis., 591 (1879), the tenants, before surrender, asked the landlord if they might leave their fixtures and he replied that he was willing, as the fixtures might help him to rent the store. Said Ryan, C. J.: "It was permission to leave behind, not to re-enter and remove. * * * * * The question and answer * * * * * are both ambiguous. The question will well bear the construction of being founded on the convenience * * * * to leave the fixtures behind to save the trouble and expense of removing them. * * * * For it is difficult to understand how the fixtures could aid * * * * in renting * * * * * store, if they were removable at pleasure. * * * * The answer is a mere assent to the fixtures being left. * * * * It would be most dangerous to imply a right to enter upon realty and sever things attached to it, upon such vague and ambiguous language."]

[13] See Dostal v. McCaddon, 35 Iowa, 318 (1872); Beckwith v. Boyce, 9 Mo., 556 (1845); Gaffield v. Hapgood, 17 Pick., 192 (1835); Talbot v. Whipple, 14 Allen, 177 (1867); Thomas v. Crout, 5 Bush. (Ky.), 37 (1868); State v. Elliot, 11 N. H., 540 (1841), windows fitted to a house; Brooks v. Galster, 51 Barb., 196 (1868), nursery trees left by a tenant, a nurseryman, planted on the premises after surrendering possession; Leader v. Homewood, 5 C. B. (N. S.), 546 (1858); Lyde v. Russell, 1 B. & Ad., 394 (1830), bells left hanging in a house; Bliss v. Whitney, 9 Allen, 114 (1864); Merritt v. Judd, 14 Cal., 59 (1859); Allen v. Kennedy, 40 Ind., 142 (1872). See, also, Burk v. Hollis, 98 Mass., 55 (1867). [Carr v. Georgia R. R., 74 Ga., 73, 81 (1884); Youngblood v. Eubank, 68 Ga., 630, 633 (1882); Leman v. Best, 30 Ill. App., 323, 326 (1888); Donnelly v. Thieben, 9 Ill. App., 495, 499 (1881); Hedderich v. Smith, 103 Ind., 203, 205 (1885); Erickson v. Jones, 37 Minn., 459, 460 (1887);

a class of cases and *dicta* which apparently support a contrary doctrine. Thus, in Holmes v. Tremper,[14] which was the case of a cider-mill and press erected by a tenant on a farm, the demised premises, and alleged to have been annexed to, and parcel of, the said farm, but how annexed not being stated, it [*140] *was observed by Spencer, C. J.: "The plaintiff's counsel supposes that the tenant could not remove this mill after the end of the term. It is true, that if she entered upon the plaintiff's possession and took away the mill, she would be a trespasser on the soil, and answerable for breaking the close; but leaving the mill there, if it belonged to her, would not work any change of the property; and in this action the trespass for entering on the premises is not in question; and when it is said that the removal must be within the term or else he will be a trespasser, it means only a trespasser as regards the entry."[1] The learned judge, in another part of the opinion,

Walsh v. Siehler, 20 Mo. App., 374, 380 (1886); Friedlander v. Ryder, 30 Neb., 783, 787 (1890); Free v. Stuart, 39 Neb., 220, 226 (1894); Bedlow v. New York Dock Co., 112 N. Y., 263, 282 (1889); Darrah v. Baird, 101 Pa. St., 265, 272 (1882); Childs v. Hurd, 32 W. Va., 66, 103 (1889); Fitzgerald v. Anderson, 81 Wis., 341, 343 (1892); Josslyn v. McCabe, 46 Wis., 591, 592 (1879); Harrison v. Smith, 19 Nova S., 516 (1887); Daly v. Marshall, 4 N. Z. L. R., Supr. Ct., 28, 34 (1885); see, also, Nolan v. Rotsler, 135 Cal., 264 (1901); Stevens v. Burnham, 62 Neb., 672, 673 (1901); Smith v. Felt, 50 Barb., 612 (N. Y., 1868); Albert v. Uhrich, 180 Pa. St., 283 (1897); Sampson v. Camperdown Mills, 64 Fed., 939, 942 (U. S. C. C., S. C., 1894); Donkin v. Crombis, 11 Up. Can. C. P., 601.]

[Nor has a purchaser at a foreclosure sale under a chattel mortgage before the expiration of the lease, any right to remove after the lease expires. Sweet v. Myers, 3 S. Dak., 324, 330 (1892).]

[14] 20 John., 29 (1822).

[1] This doctrine is approved in Lawrence v. Kemp, 1 Duer, 363 (1852), with reference to gas-fixtures and sitting-stools placed by a tenant in a store.

It is not perceived upon what doctrine this case can be supported, unless the articles in question are considered as mere chattels, which they seem to have been considered. See, also, *dictum* in Pemberton v. King, 2 Dev., 376 (1830), disapproved in Merritt v. Judd, 14 Cal., 68 (1859); Penton v. Robart, 2 East, 88 (1801); Anthony v. Haneys, 8 Bing., 186 (1832). [See Western N. C. R. R. v. Deal, 90 N. C., 110 (1884).]

In Lyde v. Russell, 1 B. & Ad., 394 (1830), where a yearly tenant of a house at his own expense during the term hung bells on the premises, but quitting the premises without removing them, the landlord afterwards took

also observes, that the tenant had an unquestionable right to remove the mill and press as personal property, in which view of the case the above observations were undoubtedly correct, as the title to a chattel is not lost by a tenant's leaving it on the demised premises after the end of his term, though he may subject himself to an action of trespass by its recaption.[2] The above observations, however, in so far as they seem to favor *the doctrine that a tenant may rightfully remove fix- [*141] tures annexed by him to the demised premises, after the termination of his term and surrender of possession to the landlord, subject only to an action of trespass for the entry upon the close, are contrary to the clear weight of authority, and are not the law.[3]

These remarks will explain the cases referred to in the first chapter of this work, where the articles in question, by reason of their not being annexed to, but only resting upon, the realty, were considered by the courts to be chattels merely, and hence

them down and refused to deliver them to the tenant, it was argued that the bells did not become the property of the landlord, because the tenant might remove them during his term; that if not removed by him during his term, he could not enter afterwards for the purpose of taking them away; that he would be a trespasser in so doing; nor could he maintain trover while they remained affixed, but when severed they became again goods and chattels, and the property being in the tenant, he might maintain trover. It was, however, *held*, that by remaining fixed to the freehold after the expiration of the tenancy, they became the property of the landlord, and the tenant could not maintain trover for them after the landlord had severed them from the freehold. [See *post*, p. *435, and Stokoe v. Upton, 40 Mich., 581, 584 (1879).]

[2] See Dame v. Dame, 38 N. H., 429 (1859); Corey v. Bishop, 48 N. H., 146 (1868); Davis v. Emery, 61 Me., 140 (1870); *ante*, p. *125, note. See, also, Folsom v. Moore, 19 Me., 252 (1841). [See Broaddus v. Smith, 121 Ala., 335, 339 (1898).]

[3] See the cases already cited in this section, also the cases hereinafter cited.

He may, however, remove furniture. Thus, a case of drawers, a large mirror and a glass case affixed by a tenant to a wall with nails or screws, are not fixtures which he forfeits, unless removed at the expiration of the tenancy, but personalty removable by him at any time afterwards. McLeod v. Jones, Bristol (1870), 3 Mass. Dig. (Ben. & Hol.), 353; s. c. *nom.* Guthrie v. Jones, 108 Mass., 191.

to belong to, and be removable by, the tenant, though not done till after the end of the term.[4]

But in cases where the tenant is wrongfully prevented by the act of the landlord from removing his fixtures before the expiration of the term, the rule does not apply.[5] And this rule is applied to cases where such act of prevention has been by the use of legal or equitable process; thus, where the landlord before the expiration of the tenancy (during which the tenant might rightfully remove his fixtures) sues out an injunction,

[4] Wansbrough v. Maton, 4 Ad. & E., 884 (1836); *ante*, p. 14, *et seq.*, and notes; also, *post*, at the end of this section. [Crerar v. Daniels, 109 Ill. App., 654 (1903).]

[5] See Moore v. Wood, 12 Abb. Pr., 393 (1860), where the landlord's refusal to allow the tenant to remove trade fixtures at the expiration of his term on his being dispossessed for non-payment of rent, was held to amount to a conversion. [Smuseh v. Kohn, 49 N. Y. Supp., 176, 178 (1898); Watts v. Lehman, 107 Pa. St., 106 (1884); Bermea Lumber Co. v. Adoue, 20 Tex. Civ. App., 655, 661 (1899); Young v. Consolidated Imp. Co., 23 Utah, 586, 594 (1901); Argles v. McMath, 23 Ont. App., 44 (1896); see, also, Updegraff v. Lesem, 15 Colo. App., 297, 307 (1900), where the landlord notified the tenant to keep off the premises and locked the doors; Podlech v. Phelan, 13 Utah, 333, 340 (1896), where the landlord, before the expiration of the lease, claimed that the fixtures were his, and where an attempt to remove them might have resulted in a breach of the peace. See Waterman v. Clark, 58 Vt., 601 (1886).]

[Where, just prior to the expiration of the lease, the landlord proposes to buy the improvements, and negotiations pend until after the expiration of the lease, upon failure of such negotiations the tenant has a reasonable time thereafter to make the removal. Caperton v. Stege, 91 Ky., 351 (1891); Merriam v. Ridpath, 16 Wash., 104 (1896); likewise where the tenant holds over with the consent of the landlord, pending negotiations for a lease. Sagar v. Eckert, 3 Ill. App., 412, 417 (1879); Lewis v. Perry, 149 Mo., 257, 268 (1899).]

[The mere fact that houses are suffered to remain on a lot after the expiration of the lease, during litigation between the parties as to possession of the lot, does not forfeit them. Atkison v. Dixon, 96 Mo., 588, 590 (1888).]

[Where a dispossessed tenant recovers possession through the courts, and then surrenders his possession to the landlord, a tenant who was placed in possession by the landlord after the first tenant was dispossessed, and who was in possession when such tenant is placed in possession by the sheriff, will have a reasonable time to remove his fixtures after the landlord resumes final possession. Wright v. Macdonell, 27 S. W., 1024 (Tex. Civ. App., 1894).]

and the tenant is thereby prevented by this interference from making the removal during his term, he or his assignee, within a reasonable time after the dissolution of such injunction, may lawfully remove such fixtures, although the term may have expired pending such injunction and he be out of possession of the demised premises.[6]

*Though, as we have already seen, it is well settled that [*142] a tenant may not, in the absence of an agreement giving that right, remove his fixtures after the expiration of his term and surrender of the possession of the demised premises, there have been some cases where the tenant holding over after the expiration of his term has been considered while yet in possession, not to have lost such right of removal. The case of Penton v. Robart[7] is usually cited in support of this distinction. In that case where an under tenant, against whom judgment in ejectment had been rendered in favor of the reversioner, remained in possession for some time afterwards and after the termination of the original term by notice to quit, and on his removal pulled down the wooden superstructure and carried away the materials of a varnish-house (brought by him from another place where he had exercised his trade, and set up on a brick foundation let into the ground, with a chimney belonging to it), it was held that the defendant did no more than he had a right to do, he being still in possession of the premises at the time the things were taken away, and there being, therefore, no pretense to say he had abandoned his right to them. The principle of this case has been since approved in several instances,[8] but it seems opposed by both reason and authority.

[6] Mason v. Fenn, 13 Ill., 525 (1852); Bircher v. Parker, 40 Mo., 118 (1867); s. c., 43 Mo., 443 (1869); Goodman v. Hannibal and St. Jo. R. R. Co., 45 Mo., 33 (1869). But in such case the value of the fixtures is not to be assessed as damages upon the dissolution of the injunction. Bircher v. Parker (*supra*). [*Ex parte* Hemenway, 2 Lowell, 496, 498 (U. S. Dist. Ct., Mass., 1876); see, also, Allen v. Dent, 72 Tenn., 676, 681 (1880); and, *post*, p. *407.]

[7] 2 East, 88 (1801).

[8] See Roberts v. Kain, 6 Robt., 354 (1868), which seems to imply that trade fixtures cannot be held by the landlord as against the mortgagee of the tenant, though left by the tenant on the premises after his being dispossessed for non-payment of rent; Keogh v. Daniell, 12 Wis., 172 (1860); Dubois v. Kelly, 10 Barb., 509 (1851); Ombony v. Jones, 19 N. Y., 239

With reference to cases of the removal of fixtures by a tenant holding over after the expiration of his term, the true line of distinction seems to be whether the possession of the tenant at the time of such removal is a rightful possession or not. For if his holding over and continued possession are tortious, it [*143] *seems inconsistent with principle to allow him to reap an advantage from his own wrongful act in so holding over, and thereby extend his right of removing his fixtures beyond the expiration of his rightful term. This seems to be the principle now adopted and settled by the weight of authority.

In Weeton v. Woodcock,[9] the question came under consideration, and the rule to be collected from the several cases decided on the subject, was stated by Alderson, B., to be "that

(1859). In this case, however, the under tenant, after surrendering to the reversioner, continued to occupy, agreeing to quit when required by the original lessor, the reversioner, so that his possession was not wrongful, but he remained a tenant at will. See, however, the following pages and notes.

[A tenant, having the right to remove a fixture, may do so while in possession after the expiration of his term, although the land has been devised to another. Sagar v. Eckert, 3 Ill. App., 412 (1879).]

[See Dunn v. Garrett, 7 N. Brunsw., 218, 222 (1851), where a removal upon the day the tenancy expired was considered in sufficient time.]

[9] 7 M. & W., 14 (1840). Alderson, B., further said: "That was the rule on which this court acted in Minshall v. Lloyd, 2 M. & W., 460, in which Mr. Baron Parke, in giving his judgment, puts it on the ground that there was 'no doubt that in that case the steam-engines were left affixed to the freehold after the expiration of the term, and after the plaintiffs had any right to consider themselves tenants.' In the present case, also, the boiler was removed after the entry for a forfeiture, and at a time after the assignees had ceased to have any right to consider themselves as tenants." The term, in this case, pursuant to a proviso in the lease, was forfeited by the bankruptcy of the lessee, and the lessor entered upon the assignees in order to enforce the forfeiture; but three weeks afterwards, the assignees of the lessee, who still continued in possession, sold and removed a fixture, a steam-engine boiler, put up by the lessee for trade purposes, and the jury found that such removal was not made within a reasonable time after such entry of the lessor, and it was *held,* that the boiler was removed after the assignees had ceased to have any right to consider themselves as tenants; and further, even if they had the right, in a case where the entry determining the tenancy was the act of a third person, to consider themselves entitled to a reasonable time for removing the fixture, the jury had found that they did not avail themselves of that privilege.

the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him, as he holds the premises under a right still to consider himself as tenant." In other words, the right of the tenant to remove his fixtures must be exercised either during the term as fixed by the contract, or during such further period as the tenant may lawfully and rightfully remain in the possession of the leased premises. This rule has in substance been approved by the subsequent cases, and may be regarded as the prevailing rule on the subject.[10] Thus, where the tenant holds over by

[10] See London, etc., Loan & Discount Co. v. Drake, 6 C. B. (N. S.), 798, 810 (1859); s. c., 5 Jur. (N. S.), 1407; 28 L. J. (N. S.), C. P., 297; Merritt v. Judd, 14 Cal., 59 (1859); Thomas v. Crout, 5 Bush (Ky.), 37, 40 (1868); Cromie v. Hoover, 40 Ind., 49 (1872); Allen v. Kennedy, 40 Ind., 142 (1872); Gibb. Fixt., 41. See, also, Roffey v. Henderson, 17 Q. B., 574, 586 (1851); Mackintosh v. Trotter, 3 M. & W., 184, 186 (1838); Heap v. Barton, 12 C. B., 274, 280 (1852); King v. Wilcomb, 7 Barb., 263, 266 (1849). [Youngblood v. Eubank, 68 Ga., 630, 633 (1882); Douglass v. Anderson, 28 Kan., 262, 265 (1882); Exchange Bldg. Co. v. Schuchman Realty Co., 103 Mo. App., 24 (1903); Brown v. Reno Power Co., 55 Fed., 229, 236 (U. S. C. C., Nev., 1893); Lewis v. Ocean Pier Co., 125 N. Y., 341, 351 (1891); Pronguey v. Gurney, 36 Up. Can., Q. B., 53, 64 (1874); Bacchus Com. v. Federal Soc., 22 Vict. L. R., 181 (1895); see, also, Gray v. McLennan, 3 Man., 337, 342 (1886).]

[The tenant has a right to remove his fixtures although he was mistaken as to his right to remain after the expiration of his term, if he was misled into doing so by the conduct or language of the landlord's agent. It is not necessary that there should be a formal agreement nor an extension for a definite time. Donnelly v. Frick & Lindsay Co., 207 Pa. St., 597 (1904).]

[Where a lessee of county lands has the right to remove buildings therefrom while in possession, but has not done so because he believed that a new lease had been given him, the board of supervisors will be restrained from removing him summarily. Landon v. Schenectady County, 31 Supr. Ct. (24 Hun), 75 (N. Y., 1881).]

[See, also, a *dictum* by Cooley, J., in Kerr v. Kingsbury, 39 Mich., 150, 153 (1878), that the requirement that the tenant shall remove during his term whatever he claims a right to remove at all, is based upon a rule of public policy for the protection of the landlord, and which is that the tenant shall not be suffered, after he has surrendered the premises, to enter upon the possession of the landlord or of a succeeding tenant, to remove fixtures which he might and ought to have taken away before. A regard for the succeeding interests is the only substantial reason for the rule which requires the tenant to remove his fixtures during the term;

indeed, the law does not in strictness require of him that he shall remove them during the term but only before he surrenders possession, and during the time that he has a right to regard himself as occupying in the character of a tenant.]

In Leader v. Homewood, 5 C. B. (N. S.), 546, 553 (1858); s. c., 27 L. J. (N. S.), C. P., 316; 4 Jur. (N. S.), 1062, an outgoing tenant who had held over after the end of his term, having partly removed his goods, the landlord entered before certain fixtures were severed and removed, and let the defendant into possession, who refused to deliver up the fixtures. On an action brought by the tenant therefor, the jury negatived the intention of the tenant to abandon his right to the fixtures, and it was claimed that his right to remove continued till he had evinced such intention to abandon. *Held,* that this was clearly incorrect, and that at the time of his attempted removal, his tenancy having ceased by re-entry, the right of removal was at an end. In referring to the rule laid down in Weeton v. Woodcock, Willes, J., said: "It is, perhaps, not easy to understand fully what is the exact meaning of this rule, and whether or not it justifies a tenant who has remained in possession after the end of his term, and so become a tenant at sufferance, in severing the fixtures during the time he continues in possession as such tenant. But the rule, whatever its exact meaning may be, is plainly inconsistent with the argument relied on by the counsel for the plaintiff in the present case, viz.: that the right of the tenant continues till he has evinced an intention to abandon his right to the fixtures; and that, consequently, the verdict of the jury, which has negatived any such intention, is conclusive in his favor. And it is unnecessary to consider the import of the rule with reference to the right of a tenant at sufferance during the continuance of such tenancy; because the landlord in the present case had re-entered and thereby put an end to the tenancy before the plaintiff attempted to enforce his right." In Deeble v. McMullen, 8 Ir. Com. Law, 355 (1857), Monahan, C. J., remarked: "What is to be the criterion of the tenant's right still to consider himself a tenant, I, for one, do not clearly understand." It was, however, *held,* in that case, "that a tenant who remains in possession after the determination of his tenancy by the service and expiration of a regular notice to quit, without any *bona fide* right so to do, under pretense of a right to a renewal which had been long previously forfeited, cannot, by such his tortious and illegal overholding, acquire a right as against his landlord to remove fixtures," etc.

[Where a tenant holds over and wrongfully refuses to give up possession, he can not remove fixtures. He becomes a trespasser, and the relation of landlord and tenant does not exist. Barff v. Probyn (1895), 64 L. J., Q. B., 557; Dreiske v. People's Lumber Co., 107 Ill. App., 285, 291 (1903).]

[The possession of a trustee in liquidation who disclaims the lease under the Bankruptcy Act, 1869, is not a possession under the rule stated in the text. *Ex parte* Brook (1878), 10 Ch. D., 100, 109.]

The rule is, however, different where the tenant remains in possession

*consent of the landlord, after the time for which the [*144] premises were originally let, such holding over constitutes a tenancy from year to year upon the same terms and conditions as those contained in the lease, and the right of removing his fixtures is not thereby lost.[1] The rule that the right of a tenant to re*move his fixtures must be exercised during the term, [*145] applies, not only to cases where the tenancy terminates by lapse of time, but also to cases where it is determined by his own act. Thus, he may renounce his right to remove his fixtures by a surrender of his lease to his landlord without reservation;[2] and

under a new demise of the premises, without exception or reservation of the right of removing fixtures. See the subject considered *post,* page *172.

[1] Bircher v. Parker, 40 Mo., 119 (1867); s. c., 43 Mo., 443; Mason v. Fenn, 13 Ill., 525, 529 (1852); Davis v. Moss, 38 Penn. St., 346, 353 (1861); Finney v. St. Louis, 39 Mo., 177 (1866). See, also, White v. Wakley, 26 Beav., 17 (1858); s. c., 28 L. J. (N. S.), Chanc., 77. [*Ex parte* Hemenway, 2 Lowell, 496, 500 (U. S. Dist. Ct., Mass., 1876).]

[Where there is a holding over by mutual consent, express or implied, the right of the tenant after the termination of the original lease to remove the building, will not be forfeited. "And in the absence of opposing evidence, the presumption goes that the tenant does so hold over." Neiswanger v. Squier, 73 Mo., 192, 198 (1880).]

[2] Talbot v. Whipple, 14 Allen, 180 (1867); Shepard v. Spaulding, 4 Met., 416 (1842). [Free v. Stuart, 39 Neb., 220, 227 (1894); Sampson v. Camperdown Mills, 64 Fed., 939, 943 (U. S. C. C., S. C., 1894); see, also, Stewart v. Munford, 91 Ill., 58 (1878); Darrah v. Baird, 12 Pitts. Leg. J., 240, 241 (1882); Moss v. James (1877), 47 L. J., Q. B., 160, aff'd (1878) 38 L. T. Rep., 595.] [The English Bankruptcy Act, sec. 23, provides that the trustee of a bankrupt lessee may disclaim a lease, and that a disclaimer relates back to the adjudication. Hence, the right to remove fixtures is lost after a disclaimer, although the trustee is still in possession. *Ex parte* Stephens (1877), 7 Ch. D., 127; *Ex parte* Glegg (1881), 19 Ch. D., 7, 16, reversing 15 Co. Ct. & Bankr. Cas., 240; *In re* Moser (1884), 13 Q. B. D., 738; and a severance of fixtures before the disclaimer is wrongful. *Ex parte* Brook (1878), 10 Ch. D., 100, 108; see *Ex parte* Foster (1878), 13 Co. Ct. & Bankr. Cas., 467, 468.] In Ombony v. Jones, 19 N. Y., 234 (1859); s. c., 21 Barb., 520, a tenant at will of the principal tenant erected fixtures on the demised premises, and subsequently and before the termination of the original lease, both original and sub-lessee surrendered their interests to the original lessor; the sub-lessee, however, continued to occupy, agreeing to quit when required by the original lessor, in which relation of tenant at will he continued down to the time of the attempted removal of the fixtures by the vendee thereof on a

such surrender may be implied from the acts of the tenant, as by his abandoning the premises under such circumstances as to indicate a purpose not only to cease to occupy and control them, but also to permit the landlord to resume possession thereof.[3] However, the voluntary surrender of his lease by a tenant to his landlord will not defeat or annul the previously acquired rights of his sub-tenants, vendees, or mortgagees, not parties or privies thereto;[4] and therefore where a lessee mort-

sale under a judgment to enforce a mechanic's lien thereon which accrued before such surrender, the sale being made after the surrender, and such sub-lessee having made no arrangement professing to abandon such fixtures. *Held*, that no rights were lost by such delay. In this case Penton v. Robart is cited as authority, but it is to be observed that the continued possession of the sub-lessee was a lawful one, as a tenant at will.

[3] Talbot v. Whipple (*supra*). [See Waterman v. Clark, 58 Vt., 601 (1886).]

[Where a tenant abandons the premises, leaving a steam engine fastened to a stone in the ground, and a boiler surrounded by brick masonry, they can not be levied upon as his property. Donnewald v. Turner Co., 44 Mo. App., 350 (1891).]

[Where the defendant in his plea disclaims title and possession of the premises at the commencement of the action, it is a solemn admission, and no act of entry was necessary by the plaintiff. Carr v. Georgia R. R., 74 Ga., 73, 80 (1884).]

[4] See London and Westminster Loan, etc., Co. v. Drake, 6 C. B. (N. S.), 798 (1859); McKenzie v. Lexington, 4 Dana, 129 (1836); Baker v. Pratt, 15 Ill., 571 (1854); Adams v. Goddard, 48 Me., 212 (1859); Pigott v. Stratton, 29 Law Jour. (N. S.), Chanc., 1 (1859); s. c., 6 Jur. (N. S.), 1290; 1 L. T. (N. S.), 111; Saint v. Pilley, L. R. 10 Exch., 137 (1875); Co. Lit., 338 b, and cases therein cited. [Morrison v. Sohn, 90 Mo. App., 76, 81 (1901); Duffus v. Bangs, 50 Supr. Ct. (43 Hun), 52, 55 (N. Y., 1887); see, also, Chamberlain v. McCarthy, 66 Supr. Ct. (59 Hun), 158 (N. Y., 1891); Conde v. Lee, 55 App. Div., 401 (1901), aff'd 171 N. Y., 662 (1902).]

[The presumption is in favor of the landlord, and a buyer from the tenant must show that the latter had title at the time of the purchase. Nolan v. Rotsler, 135 Cal., 264 (1901).]

[Where machinery is placed in a mill in possession of a tenant for sixty days' trial, but is suffered to remain therein long after said sixty days, and long after the tenant has surrendered possession, the owners of the machinery lose their right to remove it, the owners of the land having no notice. Hamilton v. Huntley, 78 Ind., 521, 527 (1881).]

[The surrender of a lot by a tenant does not relieve him from liability for injuries occasioned by the fall of a fence erected thereon by him. Hussey v. Ryan, 64 Md., 426, 434 (1885).]

gaged his removable fixtures, and afterwards surrendered his lease to the lessor, who granted a new term to a third person, the fixtures in question still remaining upon the premises unsevered, it was held that the mortgagees had a right to enter *and sever the fixtures, it not being competent for the [*146] tenant to defeat his grant by such subsequent voluntary surrender.[5]

[5] See London and Westminister Loan, etc., Co. v. Drake, 6 C. B. (N. S.), 798 (1859); s. c., 28 L. J. (N. S.), C. P., 297; 5 Jur. (N. S.), 1407; Ombony v. Jones, 19 N. Y., 234, 239 (1859); Adams v. Goddard (*supra*), where, however, the third person was a vendee instead of a mortgagee. See, however, Talbot v. Whipple, 14 Allen, 177, 182 (1867), where it is said, "that the plaintiffs can claim no better title to the property in controversy than that which was vested in the tenant under whom they claim as mortgagees. When the mortgage was made the building and machine were fixtures annexed to the realty of the defendant by his tenant, and which the defendant had then the inchoate right to claim as part of the freehold if not seasonably disannexed before the term was ended." The surrender in this case was not express, but by implication, and the authorities above referred to do not seem to have been brought to the attention of the court.

[Where lessor declares a forfeiture and takes possession of the leased premises, without showing facts warranting such declaration, it will be treated as a surrender by the lessee, and will not affect liens upon the leasehold estate for fixtures attached to the realty by the lessee. Dobschuetz v. Holliday, 82 Ill., 371, 374 (1876). But chattel mortgagees must remove before the lease would, by its terms, have expired. Free v. Stuart, 39 Neb., 220, 227 (1894).]

[The seller, reserving title, of articles which would be treated as trade fixtures, can remove them after surrender by the tenant to his landlord, especially if demand is made before, and removal refused. "The position of the owner of goods which the tenant has affixed to the demised premises can not be less strong than that of the tenant's assignee." Joseph Hall Mfg. Co. v. Hazlett, 11 Up. Can. App., 749 (1885), aff'g 8 Ont., 465 (1885). Medicke v. Sauer, 61 Minn., 15 (1895). In the latter case demand was not made until several months after the tenant abandoned the premises, and nearly eleven months after the last payment was due, no payments having been made, and the landlord meanwhile making new leases.]

[Judgment of dispossession of a tenant, in favor of one holding the lease as security, after the tenant has surrendered possession to his landlord, can not estop the tenant, in an action against his landlord, from claiming fixtures under an agreement with his landlord, where the landlord was not a party to the dispossession proceedings, and claimed title to the fixtures. Thorn v. Sutherland, 123 N. Y., 236, 240 (1890).]

The right of the tenant to remove fixtures may also be lost by his leaving them annexed to the premises after the termination of the lease by entry, or recovery of possession of the premises in ejectment, to enforce a forfeiture.[6] But as the hap-

See, also, Thropp's Appeal, 70 Penn. St., 395 (1872). In this case Thropp leased to Gagg a lot on which were a mill and other buildings, who erected thereon a frame building for trade purposes, which the tenant had a right to remove at the end of his term. This building was afterwards levied on as a removable trade fixture during the term under an execution against Gagg, who subsequently for a valuable consideration surrendered his term to Thropp, who had no notice of such levy, and who took possession. The constable afterwards sold the building on the execution. *Held*, that the purchaser could not remove the building. Had the constable given the landlord notice of the levy, such surrender would not have prevailed over the lien of the levy; but the property not being susceptible of manucaption, which might have been treated as notice in law, and being *prima facie* real estate, of which the creditor must have taken notice so as to put him on inquiry as to its real character, notice of levy was necessary to enable the landlord to protect his rights. [See, *post*, p. *358.]

[The right to levy upon trade fixtures must be exercised while the tenant remains in possession. Donnewald v. Turner Co., 44 Mo. App., 350, 352.]

[6] See Weeton v. Woodcock, 7 M. & W., 14 (1840); Pugh v. Arton, L. R., 8 Eq., 626 (1869); s. c., 38 L. J. (N. S.), Ch., 619; 20 L. T. (N. S.), 865; 17 W. R., 984; Davis v. Eyton, 7 Bing., 154 (1830); Minshall v. Lloyd, 2 M. & W., 450 (1837), recovery in ejectment; Whipley v. Dewey, 8 Cal., 36 (1857). See, also, Kutter v. Smith, 2 Wall., 491 (1864); Storer v. Hunter, 3 B. & C., 368 (1824); Fairburn v. Eastwood, 6 M. & W., 679 (1840). [Little Falls Water Power Co. v. Hansdorf, 127 Fed., 442, 444 (U. S. C. C., Minn., 1904); Erickson v. Jones, 37 Minn., 459, 460 (1887); Friedlander v. Ryder, 30 Neb., 783, 788 (1890); Van Vleck v. White, 66 App. Div., 14, 17 (N. Y., 1901); Massachusetts Nat. Bank v. Shinn, 18 App. Div., 276 (1897), aff'd 163 N. Y., 360, 362 (1900); Official Assignee v. Maxwell, 11 N. Z., 312 (1892).]

[An attaching creditor must remove fixtures while the tenant's right to remove them exists. Where the landlord re-enters, for non-payment of rent, the creditor's right to removal is lost; though the court intimates that if the creditor had paid the rent, a court of equity would have aided him. Morey v. Hoyt, 62 Conn., 542, 552 (1893).]

[A landlord dispossessing a tenant acquires no title to lamps as against a conditional seller thereof. Lange v. Pisch, 61 N. Y. St. Rep., 111 (1894); nor as against a mortgagee. *Re* Glasdir Copper Mines [1904], 1 Ch., 819.]

[For decisions *contra* to the rule stated in the text, see Updegraff v. Lesem, 15 Colo. App., 297, 307 (1900); Meader v. Brown, 5 N. Y. St.

pening of a cause of forfeiture does not ordinarily of itself render the lease void, but voidable only at the election of the lessor,[7] the right of the tenant to remove his fixtures is not *thereby lost unless and until the landlord takes steps to [*147] enforce the forfeiture.[8]

Rep., 839, 840 (1886); but, in the latter case, the lessor disavowed ownership, and possession seems to have been withheld by an incoming tenant. See, also, *Ex parte* Gould (1884), 13 Q. B. D., 454, where, under certain clauses in the lease, the receiver in bankruptcy was held entitled to fixtures notwithstanding forfeiture.]

[Where the lease expressly gave the lessee the right to remove machinery, such right is not lost by forfeiture of the lease after the lessee had made an assignment for the benefit of creditors. Scarth v. Ontario Power Co., 24 Ont., 446 (1894).]

[7] See Clark v. Jones, 1 Den., 516 (1845); Stuyvesant v. Davis, 9 Paige, 427 (1842); The Fifty Associates v. Howland, 11 Met., 99 (1846).

The above remarks of course do not apply in cases where the estate is so confined and limited as to create a limitation, as distinguished from a condition. See 2 Bl., Com., 155.

[8] Keogh v. Daniell, 12 Wis., 163 (1860). [See, also, Carper v. Risdon, 76 Pac., 744, 745 (Colo. App., 1904); Winkler v. Gibson, 2 Kan. App., 621 (1895); and *Ex parte* Hemenway, 2 Lowell, 496, 499 (U. S. Dist. Ct., Mass., 1876).]

But where the landlord was already in possession for all purposes except mining, the tenant having in violation of the terms of the lease abandoned his mining operations for twelve months or more, no entry was deemed necessary. Davis v. Moss, 38 Penn. St., 346 (1861). In Pennsylvania, however, the rule on this subject is peculiar, the forfeiture there depending on the terms of the instrument, unless there be evidence to affect the landlord with a waiver of the breach, like the receipt of rent or other unequivocal act. *Ibid.*

[If the term is forfeited, the landlord can not claim fixtures of the tenant seized by the sheriff before judgment in ejectment. Donkin v. Crombie, 11 Up. Can. C. P., 601, 605.]

[The tenant in possession can remove fixtures on the day notice of forfeiture is received. Argles v. McMath, 23 Ont. App., 44, 45 (1896), aff'g 26 Ont., 224, 247 (1895).]

[Where the tenant abandons the lease, having the right to remove his property, the landlord can not detain the fixtures because the tenant has failed to keep his contract when the landlord has taken no action against the tenant to enforce the covenant. Patterson v. Hausbeck, 8 Pa. Super., 36 (1898).]

[Where the demised premises are owned in common by the lessors, notice of forfeiture by one of them to the lessee, and such lessor's subsequent entry, where he does not purport to act for the others and there is

The rule that the right of removal must be exercised before the expiration of the tenancy is also necessarily subject to qualification in those cases where the tenancy is of uncertain duration, and is liable to be determined by the happening of some contingent or uncertain event on which it depends, or by the act of the lessor, as in the case of the tenancy at will. In such a case the tenant's right of removal is not terminated until after he has had a reasonable time after the happening of the event, or the determination of his will by the lessor, for the exercise of such right.[9] But a tenant at will, having no

no evidence of agency or ratification, do not affect the lessee's right to remove fixtures before the expiration of the term. Updegraff v. Lesem, 15 Colo. App., 297, 309 (1900).]

[Where the lease gives the tenant the right to remove buildings, and also provides that, upon failure to pay rent, he shall forfeit all rights in the lease, and shall deliver up possession with all improvements, the landlord must enforce his right of forfeiture during the term; otherwise it is waived. Cheatham v. Plinke, 1 Tenn. Ch., 576, 580 (1874).]

[9] See Ombony v. Jones, 19 N. Y., 238 (1859); Antoni v. Belknap, 102 Mass., 193, 200 (1869); Haflick v. Stober, 11 Ohio St., 482, 485 (1860); Northern Central R'w'y Co. v. Canton Co., 30 Md., 347, 355 (1868); Lawton v. Lawton, 3 Atk., 13 (1743); Dudley v. Warde, 1 Ambl., 113 (1751). See, also, Stansfield v. Mayor of Portsmouth, 4 C. B. (N. S.), 120 (1858); Sumner v. Bromilow, 11 Jur. (N. S.), 481 (1865).

In the case of Antoni v. Belknap, on the trial of the issue whether a tenant whose term was defeasible on a contingency and had been terminated by demand of possession, removed a fixture within a reasonable time after the demand of possession, it appeared that the fixture in question was an ice-house containing at the time of demand upwards of two thousand tons of ice; that except by the sale of one hundred tons in a lot, the ice was not removed after the demand faster than was necessary to supply the tenant's customers, about two months being consumed in its removal; that the ice would have become porous and of little value had it been removed to another building at that time of the year, and that the building was removed immediately after the removal of the ice; the landlord offered no evidence that the defendants could in any way have removed the ice faster than they did, or that they could have removed the building quicker, but the plaintiff and other witnesses testified that the defendants got the ice away as soon as possible after his demand upon them for possession. *Held*, that considering the nature and quality of the property to be removed, and the absence of evidence that any other mode of removal was practicable (there being no dispute about the facts), that the removal was within a reasonable time.

Where there is no dispute as to the facts, the question as to what is a reasonable time, it seems, is for the court. *Ibid.*

*estate which is assignable, cannot without severance, [*148] by a sale of fixtures annexed by him during his tenancy to a third person who enters and holds as tenant of the landlord, confer upon such third person a right of removal as against the landlord after such original tenant has gone out of possession.[1]

[For cases sustaining the statement made in the text, see Sullivan v. Carberry, 67 Me., 531, 532 (1877); Wittenmeyer v. Board of Education, 10 Ohio C. C., 119, 123 (1895); Cassell v. Crothers, 193 Pa. St., 359 (1899); Gardiner v. Parker, 18 Gr. Ch., 26, 29 (Ont., 1871); Clarke v. Tresider, 4 Wyatt, W. & A., 164 (Vict., 1867); see, also, Goodwin v. Perkins, 134 Cal., 564 (1901); Moss v. James (1877), 47 L. J., Q. B., 160, aff'd (1878) 38 L. T. R., 595.]

[Where a trespasser moves a house upon the land of another, and the landowner recovers a judgment for rent, such trespasser becomes a tenant at will; but if such tenant refuses to remove the building after having been repeatedly urged to do so, and the landlord takes possession, the right of removal is lost. Sullivan v. Carberry, 67 Me., 531, 532 (1877).]

[Where tenure is uncertain, tenant is allowed a reasonable time to remove fixtures after it is determined unexpectedly to him; but where, by statute, leases at will can only be terminated after reasonable notice, the term becomes certain enough that the general rule that fixtures must be removed before its expiration applies. Erickson v. Jones, 37 Minn., 459, 460 (1887).]

[Where a lease provided that if the tenant made an assignment for the benefit of creditors the term should be forfeited, the assignee in possession has a reasonable time in which to remove trade fixtures. Argles v. McMath, 23 Ont. App., 44 (1896), aff'g 26 Ont., 224, 247 (1895).]

[Where a statute gave the holder of a miner's right "at any time to remove any building," *held*, that the right was analogous to that of a tenant at common law, and that at the farthest such erections must be removed within a reasonable time after the term expired. Summers v. Cooper, 4 Austr. Law T., 57 (1882).]

[In Official Assignee v. Maxwell, 11 N. Z., 312, 316 (1892), six months was held not to be a reasonable time; and in Meader v. Brown, 5 N. Y. St. Rep., 839, 840 (1886), it is said that what is a reasonable time is for the jury to determine.]

[Where a lease provides that it shall "continue from month to month during the pleasure of the" lessee, and that the lessee has "the right to remove or dispose of * * * buildings situated upon the property surrendered at such time as may be convenient to" him, the lessee can not, by giving notice, and remaining in exclusive control of the premises while he disposes of the buildings, terminate his liability for rent for the time occupied in disposing of the buildings. Morgan v. United States, 14 Ct. Cl., 319 (1878).]

[1] Dingley v. Buffum, 57 Me., 381 (1869). [Wake v. Hall (1880), 7 Q. B. D., 295; see, also, Stout v. Stoppel, 30 Minn., 56, 58 (1882).]

It is to be observed that, as has already been seen, property affixed to the land of another by his license is personal property, and is not within the rule requiring fixtures to be removed by a tenant during his term.[2] And a license to erect a building or other structure upon the land of another cannot be revoked so as to make the owner of the structure a trespasser for entering and removing the same within a reasonable time after such license is countermanded.[3] But though his title to such structure might not be lost by leaving it on the premises, yet, if after the determination of the license he should not remove the structure within a reasonable time, he would probably be liable in trespass for a subsequent entry to remove it.[4]

Usually the temporary interest of the tenant in the land he occupies is limited by a term of years, or the termination of a

[2] Northern Central Rwy. Co. v. Canton Co., 30 Md., 347 (1868). See, also, *ante*, pp. *125, *141. [Sagar v. Eckert, 3 Ill. App., 412, 417 (1879); Western N. C. R. R. v. Deal, 90 N. C., 110, 113 (1884).]

[Where a grantor of land has a personal license to operate oil wells upon the land and to remove mining machinery therefrom, this right terminates with his death. Shields v. Delo, 145 Pa. St., 393, 398 (1891).]

[3] See Barnes v. Barnes, 6 Vt., 388 (1834); Preston v. Briggs, 16 Vt., 129 (1844), and the cases cited in next note. [Salley v. Robinson, 96 Me., 474, 478 (1902).]

[Where a person is sued for trespass upon land and hauling away a frame house, a defense that he built the house upon the land of the plaintiff under a license, with the intention of removing the same, and that he removed the same in good faith doing no unnecessary damage to the premises, is sufficient. Schoonover v. Irwin, 58 Ind., 287 (1877).]

[The owner of land selling a house thereon, impliedly licenses the purchaser to enter and remove it, and such license can not be revoked, and is a sufficient defense to an action for trespass. Rogers v. Cox, 96 Ind., 157, 158 (1884).]

[4] See Corey v. Bishop, 48 N. H., 146 (1868); Dame v. Dame, 38 N. H., 429 (1859). [See Halstead v. American Gas Co., 17 Pa. Super., 605 (1901).]

[Where a house, erected by license of the landowner, is not removed within a reasonable time after the builder is dispossessed, it becomes a part of the realty. Turner v. Kennedy, 57 Minn., 104, 107 (1894).]

[Where a railroad company, owing to a change in its route ordered by the legislature, and which required an indefinite period of time to make, gave up possession of a brick freight station, it did not lose the right to remove the station two years later when it required it in the erection of a new depot on its new line. Western N. C. R. R. v. Deal, 90 N. C., 110 (1884).]

specified life. But in the case of letting of land for the purpose of nurturing trees and plants until they are ready to be transplanted, in the absence of any express agreement, it is held, that the interest of the tenant in the land for the purpose contemplated by the parties, continues until that purpose is accomplished.[5]

*V. Of the Right of Removing Fixtures as Affected [*149] by Special Agreements in Relation Thereto.[1]

Having in the last section considered the general right of a tenant as against his landlord to remove his fixtures in the absence of any special agreement between the parties affecting the question, we come now to consider the effect upon such right of removal, of agreements on the subject between the parties.

It is well settled that the general right of removing fixtures erected by the tenant during his term, as also the time within

[Where a railway company abandons a track which has been laid upon land over which it had an easement, the rails pass to the owner of the land. Missouri Pac. R'y Co. v. Bradbury, 79 S. W., 966 (Mo. App., 1904).]

[5] King v. Wilcomb, 7 Barb., 263 (1849). In this case by the consent of one member of the firm, the firm removed to land owned by such member individually a portion of their trees and shrubs, who, after such trees, etc., were planted, mortgaged said land to a third person, and the land was sold thereon, neither the mortgagee nor the purchaser at such sale being entitled to protection as *bona fide* purchasers without notice; and it was *held*, that the relation of landlord and tenant was created by the permission to occupy the land; that there was implied a license to remove the property planted when the proper period of removal should arrive, and that the other member of the firm might enforce his rights against such mortgagee and purchaser to the same extent as he might have done against the mortgagor had the title still remained in him. See Miller v. Baker, 1 Met., 27 (1840); also, the rights of tenants who are nurserymen, considered *ante*, p. *106.

[1] This section relates mainly to annexations made by the tenant himself, and not to those made by parties not sustaining the relation of landlord and tenant or by the landlord and in existence at the time of making the demise. In a few instances, however, cases have been referred to in the notes, where the questions arose between parties not sustaining the relation of landlord and tenant. Such cases, however, were exceptional, and seemed more properly to belong to this section than to any other part of the work.

which he may exercise that right, are almost entirely within the control of the parties, and may, as between the landlord and tenant, be restricted, modified, or extended, according to the agreement of the parties,[2] subject, of course, to the limitation that such agreement does not violate the express provisions of any law, and that the interest of the public generally, or of third persons in particular, shall not be injuriously affected by its fulfillment. Subject to these limitations, *modus et conven-*
[*150] **tio vincunt legem.*[3] In like manner property annexed to the realty by a tenant, and which would otherwise be realty, may, by a previous agreement between himself and the landlord, be made to continue to be personal property after and notwithstanding such annexation; and where, by agreement between landlord and tenant, the right of removing fixtures is reserved to the tenant, it seems that such fixtures remain personal property and are removable as such by the tenant, the rule in such case being the same as laid down in a previous chapter.[4] It is

[2] See Merritt v. Judd, 14 Cal., 59, 70 (1859); McCracken v. Hall, 7 Ind., 30 (1855); White's Appeal, 10 Penn. St., 252 (1849). See, also, *ante*, Chap. 3. [Larquier v. White, 29 La. Ann., 156 (1877); O'Brien v. Mueller, 96 Md., 134, 137 (1902).]

[An agent employed by the landlord to lease premises and collect rent, has no authority to permit a tenant to remove fixtures which are a part of the premises, or divest the landlord of his ownership of such fixtures by anything he might say or do. Gauggel v. Ainley, 83 Ill. App., 582, 587 (1898).]

[A clause permitting the removal of articles which are trade fixtures, confers no right which the tenant would not have had without it. Updegraff v. Lesem, 15 Colo. App., 297, 308 (1900).]

[3] Broom Leg. Max., 661, *et seq.*

[4] White's Appeal, 10 Penn. St., 252 (1849); Hartwell v. Kelly, 117 Mass., 235 (1875), and cases there cited; Alexander v. Touhy, 13 Kan., 64 (1874); Adams v. Goddard, 48 Me., 212 (1859). [Broaddus v. Smith, 121 Ala., 335 (1898); Chalifoux v. Potter, 113 Ala., 215, 219 (1896); Denver Transfer & Warehouse Co. v. Swem, 8 Colo., 111, 112 (1884); Parker v. Redfield, 10 Conn., 490, 496 (1835); First Nat. Bank of Joliet v. Adam, 34 Ill. App., 159 (1889); McCarthy v. Burnet, 84 Ind., 23 (1882); Price v. Malott, 85 Ind., 266, 269 (1882); Morrow v. Burney, 2 Ind. Ter., 440, 443 (1899); McCarthy v. Trumacher, 108 Iowa, 284 (1899); Brinkmeyer v. Rankin, 22 Ky. Law Rep., 1881, 1882 (1901); O'Brien v. Mueller, 96 Md., 134, 137 (1902); Korbe v. Barbour, 130 Mass., 255, 258 (1881); Lake Superior Iron Co. v. McCann, 86 Mich., 106 (1891); Booth v. Oliver, 67 Mich., 664, 668 (1888); Osborn v. Potter, 101

Mich., 300 (1894); Pioneer Co. v. Fuller, 57 Minn., 60, 62 (1894); Neiswanger v. Squier, 73 Mo., 192, 198 (1880); Atkison v. Dixon, 96 Mo., 588, 589 (1888); Adams v. St. Louis & S. F. R'y Co., 28 S. W., 496, 497 (Mo., 1894), aff'd in 29 S. W., 836 (Mo., 1895); Kuhlman v. Meier, 7 Mo. App., 260, 263 (1879); Dryden v. Kellogg, 2 Mo. App., 87, 92 (1876); John O'Brien Boiler Co. v. Haydock, 59 Mo. App., 653, 660 (1894); Mayo v. Newhoff, 47 N. J. Eq., 31, 35 (1890); *Re* Welch, 108 Fed., 367 (U. S. Dist. Ct., N. Y., 1901); *Re* City of Buffalo, 1 N. Y. St. Rep., 742, 746 (1886); Kribbs v. Alford, 120 N. Y., 519, 523 (1890); John T. Dyer Company's App., 21 Pa. Co., 442 (1898); Stark v. Hight, 3 Pa. Super., 516, 520 (1897); Advance Coal Co. v. Miller, 4 Pa. Dist., 352, 356 (1895); Sattler v. Opperman, 30 Pitts. Leg. J., 205 (1900); Wick v. Bredin, 189 Pa. St., 83, 93 (1899); Hope Ins. Co. v. Brolaskey, 35 Pa. St., 282, 283 (1860); East Tenn., V. & G. R'y Co. v. Morristown, 35 S. W., 771 (Tenn. Ch., 1895); Weltman v. August, 11 Tex. Civ. App., 604, 605 (1895); Keefe v. Furlong, 96 Wis., 219, 222 (1897); Oswald v. Whitman, 22 Nova S., 13, 16 (1889); see, also, Cheatham v. Plinke, 1 Tenn. Ch., 576, 580 (1874); Hertzberg v. Witte, 22 Tex. Civ. App., 320, 322 (1899). For the same rule as between parties not tenants, see, *ante*, p. *66.]

[A landlord dispossessed a tenant wrongfully, and leased the land to another who erected fixtures having, under his lease, the right to remove them. The first tenant recovered possession of the land and of the fixtures. Upon surrender of possession by the first tenant, *held*, that the landlord was estopped from denying the right of the second tenant to remove his fixtures. Wright v. Maedonell, 88 Tex., 140, 149 (1895).]

[Where buildings are erected by a tenant with the permission of the landlord, a right to remove same will be implied. Gordon v. Miller, 28 Ind. App., 612, 619 (1901); McDonald v. Shepard, 25 Kan., 112, 115 (1881); and there is sufficient consideration for the landlord's promise to pay therefor. Duff v. Snider, 54 Miss., 245, 253 (1876). But where, under an agreement that the tenant is to pay the cost, but with no agreement for removal, the landlord builds a studio permanently affixed to a brick building, the tenant has no interest therein beyond his right to the use of it during his term. Butler v. Colwell, 89 Ill. App., 133, 137 (1900); and the fact that a lessee is given permission to substitute one building for another is not, in itself, equivalent to permission to remove the substituted building. Holmes v. Standard Pub. Co., 55 Atl., 1107, 1108 (N. J. Ch., 1903).]

[Buildings which a tenant has the right to remove are personal property, and an action for the recovery of damages for their destruction in another state, is transitory. Laird v. Railroad, 62 N. H., 254, 261 (1882).]

[Where the buyer of ice-houses takes a lease of the land upon which they stand, which lease expressly provides that he may remove them, they are personal property, and he can not, by insisting that they are realty,

also well settled that agreements between the landlord and tenant, authorizing the latter or his under-tenant to remove fixtures annexed by them, at or before the expiration of the term,

seek to recover the value of the consideration. Haudforth v. Jackson, 150 Mass., 149 (1889).]

[See Kay v. Hathaway, 21 Tex. Civ. App., 466 (1899), as to the right to remove a house upon the performance of a condition.]

A tenant making improvements during his term, which by agreement he has the right to remove, may at least make such removal after the expiration of his term while he holds over and still remains in possession of the premises. Dubois v. Kelly, 10 Barb., 509 (1851). And as such annexations are personal property, it seems that they are not lost by leaving them on the premises after quitting possession. See *ante*, p. *148.

[When the lease expires, the owner's consent continues for a reasonable time, unless he withdraws it and demands the removal of the buildings. If, after such demand, the owner of the buildings fails to remove them within a reasonable time, he will be presumed to have abandoned them to the owner of the land. What is a reasonable time should be determined from all the facts and circumstances. If the claim was not made within a reasonable time, that fact might be considered by the jury as evidence tending to prove an abandonment. Kuhlmann v. Meier, 7 Mo. App., 260, 264 (1879).]

See, however, Burk v. Hollis, 98 Mass., 55 (1867), which seems to favor a contrary opinion, though the case is not clear upon the point; also, Overton v. Williston, 31 Penn. St., 155 (1858), where a party covenanted to erect a steam saw-mill on the land of another, to furnish all the machinery therefor, and to manufacture lumber therewith out of logs to be furnished by the owner of the land for a period of five years for a fixed price, at the end of which time the mill and buildings were to belong to the owner of the land, and the machinery to the party erecting the mill, and it was *held*, that considering the agreement in the most favorable light, it placed such party in no better position than a lessee, and that his right to remove the machinery could not be exercised after the expiration of the time mentioned in the contract. See, also, Sumner v. Bromilow, 11 Jur. (N. S.), 481 (1865); s. c., 34 L. J. (N. S.), Q. B., 130; Stansfield v. Mayor of Portsmouth, 4 C. B. (N. S.), 120 (1858); s. c., 4 Jur. (N. S.), 440; 27 L. J. (N. S.), C. P., 124; *ante*, Chap. 3. [Childs v. Hurd, 32 W. Va., 66, 103 (1889).]

[A provision that buildings, etc., shall not become part of the realty can have no more effect than making them trade fixtures; and where such provision requires their removal by the end of the term, and another provision requires delivery of the premises immediately upon the termination of the term, the right of removal is lost by not removing them during the term, although the lessee remains in possession. Dreiske v. People's Lumber Co., 107 Ill. App., 285 (1903).]

are not within the Statute of Frauds, and may be by parol.[1] *The last proposition is of course subject to the qualifica- [*151] tion that is imposed by the rule that "parol contemporaneous evidence is inadmissible, to contradict or vary the terms of a valid written instrument."[2] But where a lease contained the provision that materials contained in an old building on the premises might be used by the lessee in the construction of a new house to be erected by him, but was silent as to the right of removal or compensation, and did not fully recite the agreement in reference to such buildings, it was held that it might

[1] Dubois v. Kelly, 10 Barb., 507 (1851); Powell v. McAshan, 28 Mo., 70 (1859). [Broaddus v. Smith, 121 Ala., 335 (1898); Royce v. Latshaw, 15 Colo. App., 420, 424 (1900); Ryder v. Faxon, 171 Mass., 206, 207 (1898); Neiswanger v. Squier, 73 Mo., 192, 198 (1880); Torrey v. Burnett, 38 N. J. Law, 457, 461 (1875); Cowell v. Phoenix Ins. Co., 126 N. C., 684 (1900); see, also, *ante*, p. *139.]

[A subsequent oral agreement between a tenant and his sub-tenant that the latter may replace trade fixtures belonging to the former, such fixtures to belong to the tenant, is valid. Podlech v. Phelan, 13 Utah, 333, 336 (1896).]

A parol promise to pay for improvements made upon land is not within the Statute of Frauds, they not being an interest in land, but only another name for work and labor bestowed upon it. Lower v. Winters, 7 Cow., 263 (1827); Sutton v. Sears, 10 Ind., 223 (1858); Frear v. Hardenberg, 5 John., 272 (1810). See, also, Kelly v. Webster, 12 C. B., 283 (1852); s. c., 16 Jur., 838; 21 L. J. (N. S.), C. P., 163; and *post*, p. *343, under the head of Statute of Frauds, where the subject is more fully considered. [South Baltimore Co. v. Muhlbach, 69 Md., 395, 404 (1888).]

[2] 1 Greenl. Ev., § 275. This subject was considered in Jungerman v. Bovee, 19 Cal., 354 (1861). In this case F. leased a lot sixty feet front to B. & M., the lease containing a covenant that at the end of the term the lessees would peaceably, etc., surrender and yield up all the demised premises, but no covenant for quiet enjoyment; there was also a contemporaneous parol understanding that the lessees might remove the buildings to be erected by them on the premises. Subsequently, and before the expiration of the original lease, on F.'s selling his interest in the premises to two separate purchasers in parcels of thirty feet front each, in order to apportion the rent the old lease was cancelled and two new leases executed by F. to B. & M. of the respective portions of the demised premises, which contained a covenant for the surrender of all and singular the said demised premises, and also a covenant for quiet enjoyment. At the time of the execution of the second leases the buildings in question had been erected and were standing upon the demised land. These leases F. assigned to the respective purchasers. Contemporaneously with the execution of

[*152] *be shown by parol that the lessee was to be paid for the building or else permitted to remove it; and that this agreement being established, the tenant should not be restrained from removing it in the absence of any offer by the lessor to reimburse him for his outlay.[1] As between landlord and tenant

such second leases there was had the same understanding between F. and M. & B. as to the right to remove the buildings at the end of the term. *Held*, that by taking the second leases the first was surrendered and abrogated; that evidence of the contemporaneous agreement as to the removal of the buildings not showing an independent agreement or license to remove them, but simply the lessor's construction or understanding of the lease, was inadmissible to contradict and vary the terms of the lease. And it seems that such a right or privilege contemporaneously given by an oral agreement directly contradicting the effect of the writing, could not be set up against the writing, even if it were by an independent agreement or a license.

It was also decided in West v. Blakeway, 2 M. & G., 729 (1841); s. c., 3 Scott, N. R., 199; 9 Dowl. P. C., 846; 5 Jur., 630, in accordance with the rule that a contract under seal cannot be varied by parol, that a plea to a breach of a covenant to yield up at the expiration of the term all erections and improvements, that it was agreed between lessor and lessee that if the latter should erect a greenhouse he might remove it at the end of his term, was bad.

[See Kenney v. Matlack, 12 Atl., 589 (Pa., 1888).]

[Where a person, who was offered the assignment of a lease and the sale of certain fixtures, informed the landlord that he was willing to purchase if he could remove the fixtures, and the landlord agreed that if he purchased he could remove them, the tenant can show this oral agreement, and has the right of removal, although the written lease provided that improvements made by the tenant should be surrendered by him at the end of the term. Whitney v. Shippen, 89 Pa. St., 22 (1879).]

[Where proof of such oral agreement is not objected to at the trial, the tenant establishes a right to remove fixtures. Stephens v. Ely, 14 App. Div., 202 (N. Y., 1897).]

[The right to remove improvements was, by mistake of the lessor, omitted from the lease, and the lessee refused to sign unless such privilege was inserted. The lessor then said that the omission should not interfere with the lessee's right of removal, whereupon the lease was signed. *Held*, that these facts could be shown by parol, as an attempt to prevent the removal of the improvements was fraudulent, and the lease was reformed to make it speak the intention of the parties. Isenhoot v. Chamberlain, 59 Cal., 630, 637 (1881).]

[1] Gray v. Oyler, 2 Bush (Ky.), 256 (1867).

[In a lease of land, upon which were posts which had served as the foundation of a former building, the phrase "to be occupied by a build-

also, the tenant may by a verbal agreement with the landlord for that purpose reserve the right of removing his fixtures after the expiration of his term; and in such case his right thereto as against the landlord is not lost by leaving them annexed to the premises after the end of the term.[2] But as against a subsequent incoming tenant, the case is different. In such a case the license of the landlord to enter and remove the fixtures having a prospective operation, is said to be something like a grant of an interest in the land, or at all events to be a grant of authority to enter and remove something at a future time,[3] which though it might be valid if executed, or might perhaps furnish a ground of action by the tenant against his landlord for not making such a bargain with the incoming tenant as would enable the outgoing tenant to enter and take the fixtures, yet, as against such incoming tenant not being a privy thereto, it will not be binding unless it is so executed as to bind the land, and where an incorporeal inheritance affecting land cannot be created or

ing erected thereon by said'' lessee, and a covenant that at the termination of the lease the lessee should deliver up the premises in as good order and condition as they were or should be put into by the lessee, are not inconsistent with a verbal agreement that the building should be the personal property of the lessee. Ryder v. Faxon, 171 Mass., 206, 207 (1898).]

[A lessee agreed that ''all machinery and fixtures put on property by lessee to remain thereon at the expiration of the lease.'' The code conferred the right on the lessee to remove improvements. The court held that this clause in the lease did not mean that the lessee was to receive no compensation. He waived his right of statutory removal, but retained ownership. Otherwise, a stipulation to the contrary would have been added. The value of the improvements was nearly one-half that of the plantation, and the rental, aside from the improvements, was adequate. Ross v. Zuntz, 36 La. Ann., 888 (1884).]

[2] See McCracken v. Hall, 7 Ind., 30 (1855); also, Gray v. Oyler, 2 Bush, (Ky.), 256 (1867). [See Commissioners of Pitkin County v. Brown, 2 Colo. App., 473, 475 (1892); Forbes v. Mosquito Club, 175 Mass., 432 (1900); Lewis v. Ocean Pier Co., 125 N. Y., 341, 349 (1891), aff'g 3 N. Y. Supp., 911, 912 (1889); Thorn v. Sutherland, 123 N. Y., 236 (1890).]

[3] A license while executory is revocable; but a conveyance by the owner after a license granted, the lessee being in possession at the time of such conveyance and not chargeable with notice of it, is not a revocation. Dubois v. Kelly, 10 Barb., 496 (1851).

transferred otherwise than by deed, such license to be effectual as against such incoming tenant must be by deed.[4]

[4] This point is well illustrated in Roffey (or Ruffey) v. Henderson, 17 Q. B., 574 (1851); s. c., 16 Jur., 84; 21 L. J. (N. S.), Q. B., 49. In this case the plaintiff, a tenant of a house for a term of years, being possessed of tenant's fixtures for domestic use, annexed to the freehold, but removable by him as against the landlord during the term, requested the landlord to purchase them at the end of the term or to allow them to remain subject to a future tenant's taking them when the house was let, or if he should refuse to take them to be then removed. The landlord wrote in reply declining to purchase, but stating that he had no objection to the tenant's leaving them on the premises, and making the best terms he could with the incoming tenant. The articles remained unremoved till and after the entry of the new tenant under the landlord, who declined to purchase. Plaintiff then, after tenant had been two months in possession, demanded the fixtures and access for the purpose of removing them, which were refused, and the plaintiff brought case against the tenant for the hindrance, with a count in trover for the articles. *Held*, that the landlord's letter of license to plaintiff having a prospective operation, and not being by deed, was no valid grant of a privilege to remove the articles as against the new tenant in possession, to whom the landlord had demised the land without reservation and who was not a party to the license.

See, as to the necessity of a deed in order to the grant of a valid prospective license, Wood v. Leadbitter, 13 M. & W., 838 (1845), holding that a right to come and remain for a certain time upon the land of another can be granted only by deed. See, also, Wallis v. Harrison, 4 M. & W., 538 (1838).

In Roffey v. Henderson (*supra*), the question as to the fixtures being a gift to the landlord was not raised, the question being solely between the outgoing and incoming tenants, and it was stated by Coleridge, J., that the plaintiff, the outgoing tenant, might have a cause of action against the landlord for the breach of his engagement though not against the incoming tenant to whom the landlord in the exercise of his right had demised.

[Where the lessee covenants to erect improvements which he is given the right to remove, but is evicted by a paramount title, he can not recover their value from the lessor. Lanigan v. Kille, 97 Pa. St., 120, 127 (1881).]

The question as to what amounts to a license was also considered in Sparks v. Leavy, 19 Abb. Pr., 364 (1863), s. c., 1 Robt., 530. In this case the owner of real estate being applied to by one who had furnished certain fixtures (marble mantels) which he had not been paid for, for leave to enter and remove them, gave him to understand that he had no objection to the removal so far as he was concerned, but could not give his express consent for fear of trouble with the mortgagees. *Held*, that this was

*Agreements modifying the right of removing fixtures [*153] may be contained either in the original contract of letting the premises or some contemporaneous agreement, or they may be entered into subsequently to the original demise. Such agreements may enlarge and extend what would otherwise be the rights of the tenant, either as respects the time within which the right should be exercised,[1] or the articles which are the

not a license to remove them, and that he was not thereby estopped from suing him for their removal.

[An agreement between landlord and tenant that the latter may remove fixtures after quitting possession, is inoperative against mortgagees who have taken possession. Thomas v. Jennings (1896), 66 L. J., Q. B., 5.]

[Although a tenant has the right to remove a brick building erected by him, it is, as between him and an insurer, real property. Orient Ins. Co. v. Parlin-Orendorff Co., 14 Texas Civ. App., 512 (1896).]

[Any agreement between a landlord and a sub-tenant in regard to the trade fixtures of the tenant, which is not assented to by the tenant, can not affect the tenant's rights. Podlech v. Phelan, 13 Utah, 333, 339 (1896).]

[Where a tenant has the right to remove a building erected by him, and a mechanic's lien thereon is foreclosed without making him a party, his rights are not affected. Cuppy v. O'Shaughnessy, 78 Ind., 245, 250 (1881).]

[For cases bearing upon the text, see Stewart v. Munford, 91 Ill., 58 (1878); Trask v. Little, 182 Mass., 8 (1902).]

[1] See McCracken v. Hall, 7 Ind., 30 (1855); Higgins v. Riddell, 12 Wis., 587 (1860); and Gray v. Oyler, 2 Bush. (Ky.), 256 (1867). [Carper v. Risdon, 76 Pac., 744 (Colo. App., 1904); O'Brien v. Mueller, 96 Md., 134, 137 (1902); Exchange Bldg. Co. v. Schuchman Realty Co., 103 Mo. App., 24 (1903); Neiswanger v. Squier, 73 Mo., 192, 198 (1880); Duffus v. Bangs, 122 N. Y., 423, 427 (1890); Advance Coal Co. v. Miller, 4 Pa. Dist., 352, 355 (1895); Bermea Lumber Co. v. Adoue, 20 Texas Civ. App., 655, 661 (1899); Fitzgerald v. Anderson, 81 Wis., 341, 343 (1892); Busby v. Joseph, 7 N. S. W., Supr. Ct., 200 (1868); see, also, Commissioners of Pitkin County v. Brown, 2 Colo. App., 473, 475 (1892); Lewis v. Ocean Pier Co., 125 N. Y., 341, 349 (1891), aff'g 3 N. Y. Supp., 911, 912 (1889); Waterman v. Clark, 58 Vt., 601 (1886); Ferguson v. Paul (1885), 22 Scot. Law Rep., 809.]

[Before a tenant yielded up possession, his landlord agreed to make an endeavor to sell his fixtures for him to a person who was negotiating for the land. *Held*, that the fixtures did not become the property of the landlord, as the theory of abandonment would be unreasonable. For the landlord to claim the chattels as fixtures under such circumstances, because the tenant failed to remove them while in possession, would be a sheer fraud. Torrey v. Burnett, 38 N. J. Law, 457, 459 (1875). And an agreement to pay for the use of fixtures is inconsistent with

subjects of its exercise; or they may restrict or entirely divest the tenant of such rights.[2]

any ownership therein. Charlotte Furnace Co. v. Stouffer, 127 Pa. St., 336 (1889).]

[Where there was a provision in a lease for the removal of fixtures by the tenant, it was held that it should not be construed to give the tenant only such rights as the law would have implied in the absence of any agreement, unless it clearly appears that such was the intention, but was construed as intending to give the tenant the right to remove the fixtures within a reasonable time after the lease had ended, they being of such a nature that they could not well be removed upon the very day of the termination of the lease. Wright v. Macdonnell, 88 Tex., 140, 146 (1895).]

[Where the lessor waits six years after the termination of the lease before bringing an action of ejectment, the lessee will be given time to remove his improvements as provided in the lease. Maxwell Land Co. v. Santistevan, 7 N. Mex., 1, 4 (1893).]

[Where a lease gives a tenant the right to remove buildings "at the end of the term" he has a right to remove them within a reasonable time after the expiration of the term. Davidson v. Crump Mfg. Co., 99 Mich., 501 (1894); East Sugar-Leaf Co. v. Wilbur, 5 Pa. Dist., 202 (1895); Gray v. McLennan, 3 Man., 337, 346 (1886); but he must surrender possession of the lot, subject to his right of ingress and egress. Caperton v. Stege, 91 Ky., 351 (1891). An unnecessary delay of more than one month was held unreasonable in Smith v. Park, 31 Minn., 70 (1883). Where the provision is that the tenant may remove fixtures "at any time," the tenant must remove them within a reasonable time, and by a delay of four years after the expiration of the lease, such fixtures become the property of the land-owner. Shellar v. Shivers, 171 Pa. St., 569 (1895).]

[A privilege "of removing any building erected on said lands" applies to both buildings in existence when the lease is executed and to additions afterwards made. Gray v. McLennan, 3 Man., 337, 346 (1886).]

[2] See Thrall v. Hill, 110 Mass., 328 (1872), holding that where a lessee puts furniture and fixtures into the demised premises under an agreement with the lessor that they are to become the property of the lessor at the end of the term, the lessor has an interest in such fixtures, etc., that will pass by his bill of sale to a third person during the term, who may maintain trover for their conversion after the expiration of the term.

[Where a lessee covenants to deliver all buildings erected by him, the lessor takes a present estate in such buildings subject to user by the lessee during the term; and, in condemnation proceedings, the lessee is not entitled to the value of the buildings. Corrigan v. Chicago, 144 Ill., 537, 550 (1893).]

[In Dunn v. Garrett, 7 N. Brunsw., 218, 222 (1851), it was held that where a tenant, under an agreement to leave "gas fittings and fixtures,"

*With respect to agreements relating to the time of re- [*154] moval, where the landlord agrees to allow his tenant a reasonable time after the expiration of his lease in which to remove fixtures, the intention of the parties relates and if confined to the legal expiration thereof by its own limitation, and not by the wrongful act of the lessees terminating the same;[1] and in such

put up gas fittings which at common law he had a right to remove, no property therein vested in the landlord unless the gas fittings were left after the tenant had quitted possession, as the agreement mentioned them as something distinct from fixtures. The landlord had a right of action for the nonperformance of the agreement, but nothing more.]

[Where a statute provides that trade fixtures shall be personal property, it has no application where the lease expressly provides that improvements shall become the property of the landlord. Center v. Everard, 43 N. Y. Supp., 416, 417 (1897).]

[For additional cases where the tenant's right of removal was restricted, see Harris v. Kelly, 13 Atl., 523, 527 (Pa., 1888); Miller v. Gray, 29 Texas Civ. App., 183 (1902); *Re* Duperrouzel, 9 Leg. News, 380 (Super., Montreal, 1886); see, also, Hay v. Tillyer, 14 Atl., 18, 19 (N. J. Ch., (1886); Official Assignee v. Maxwell, 11 N. Z., 312 (1892); and, *post*, pp. *160 and *166.]

[Buildings erected by a tenant pursuant to a covenant in the lease, are not removable by him unless the lease gives that right, for he could have erected them without any such stipulation. His agreement to erect them is as much a part of the consideration for the rights he acquired under the lease as was his promise to pay rent. To hold that they were not to be returned to the lessor along with the premises would practically annul the provision requiring their erection. Tunis Lumber Co. v. Denis Lumber Co., 97 Va., 682, 686 (1899).]

[A lessee of a mine leased an engine and a boiler to be used in working the mine. The contract between the mine-owner and the lessee provided that all machinery used in the mine should become the property of the mine-owner. The lessor of the engine knew that it was to be used in a mine, but did not know of the agreement with the mine-owner. The engine and boiler were affixed to the mill by means of iron bolts, timbers and masonry in such a manner that they could not be removed without destroying the masonry and stone wall, and greatly damaging some of the timbers of the mill, which was permanently attached to the mine. *Held*, that, as between the lessor of the engine and the lessee, the engine and boiler remained personal property, and the mine-owner stood in the shoes of the lessee. Hendy v. Dinkerhoff, 57 Cal., 3, 5 (1880).]

[1] Whipley v. Dewey, 8 Cal., 36 (1857). [Little Falls Water Power Co. v. Hausdorf, 127 Fed., 442, 444 (U. S. C. C., Minn., 1904). But see Mickle v. Douglas, 75 Iowa, 78 (1888), which holds that where the lease expressly gives the right of removal, such right is not affected by a for-

a case there is no moral obligation on the part of the landlord sufficient as a consideration to support a subsequent promise of the landlord to pay therefor.[2] It is to be observed, however, that where the interest of the landlord is less than a fee, as an estate for life, he cannot by contract with his tenant confer rights as against the remainderman or reversioner to be exercised after the termination of his, the landlord's, estate. The remainderman or reversioner in such a case is not bound by any agreement between the tenant for life and his lessee, under which such lessee may have placed erections upon the land.

feiture.] So, where a lease contained a covenant that at the expiration of ten years it should be at the election of the landlord to purchase the buildings to be erected thereon by the tenant at the appraised value at that time, or renew the lease for ten years longer at an appraised rent, etc., at the expiration of each and every ten years during the term of 99 years, the landlord being bound either to renew the lease or purchase the buildings as aforesaid, the landlord is not bound to pay for such buildings where the lease has been determined by forfeiture and entry for non-payment of rent before the expiration of the limited time, even though by the terms of the lease the landlord was to repossess and enjoy "as in his first and former estate," and though the buildings were not on the land at the date of the lease, such words referring to the nature of the interest and not the extent of improvements on the soil. Kutter v. Smith, 2 Wall., 491 (1864).

[A disclaimer of a lease by the trustee under the English Bankruptcy Act, is a surrender of the whole lease including a provision therein giving the lessee the right to remove buildings and machinery after "the expiration or other sooner determination thereof." *Ex parte* Glegg (1881), 19 Ch. D., 7, 16, reversing 15 Co. Ct. & Bankr. Cas., 240.]

[A covenant in a lease provided that certain enumerated articles should be the property of the lessee, and removable by him. There was a subsequent proviso that, upon determination of the lease, all machinery and buildings erected by the lessee should be his property, and should be removed by him previous to the cesser of the term. The term having ceased by a bankruptcy petition, it was held that the official receiver was entitled to the fixtures, although it was not decided whether the receiver himself was entitled to remove the fixtures, or whether he could only require the lessor to deliver them, compensating the lessor for his expense. *Ex parte* Gould (1884), 13 Q. B. D., 454.]

[2] Whipley v. Dewey (*supra*).

[A promise made to a tenant by his landlord, after surrender of the premises, to allow the former to remove fixtures, is without consideration, if not made as an inducement to the surrender. Thorn v. Sutherland, 4 N. Y. Supp., 694, 696 (1889).]

Accordingly, where a tenant for life demises land to a tenant for years who under an agreement with his landlord that he shall have the privilege of selling or removing some of them, and that others are to be taken by the owner of the land at a valuation, or if that cannot be agreed upon, that the tenant shall *have the privilege of removing the materials, proceeds [*155] to erect buildings thereon, and before the expiration of the term the tenant for life dies, such buildings still remaining on the premises may not be removed by the tenant in accordance with such agreement.[3] Where a lease provides that the tenant may remove fixtures at the expiration of his term, such provision will not ordinarily be construed to prohibit their being removed during the continuance thereof.[4]

[3] White v. Arndt, 1 Whart., 91 (1836); Haflick v. Stober, 11 Ohio St., 482 (1860). [See, however, Chicago & Alton R. R. Co. v. Goodwin, 111 Ill., 273, 281 (1884).]

In such a case the reception of rent by the remainderman after the death of the tenant for life will not ratify the agreement as to the removal when it is collateral to and independent of the lease, and it does not appear that the remainderman was apprized thereof. White v. Arndt (*supra*). See Oakley v. Monck, L. R. 1 Exch., 159 (1866), cited *post*.

[4] Alexander v. Touhy, 13 Kan., 64 (1874). [Gray v. McLennan, 3 Man., 337 (1886); Busby v. Joseph, 7 N. S. W. Supr. Ct., 200 (1868); see, also, Advance Coal Co. v. Miller, 4 Pa. Dist., 352, 355 (1895); Davy v. Lewis, 18 Up. Can. Q. B., 21.] But where it was agreed that the plaintiff should be at liberty to remove the improvements made upon the land, provided the rents were paid which might be due on the lease at its expiration, the provision that the rents should be paid and the term expired were held conditions precedent to the right of removal. Mathinet v. Giddings, 10 Ohio, 364 (1841).

Where a deed conveying land to a county upon a conditional limitation contained a covenant by the grantor that "should said building cease to be occupied as a court house, the said county may remove the same from the premises without let or hindrance;" upon the termination of the estate by a breach of the condition, the county was deemed entitled to a reasonable time thereafter to remove the building, but it was *held*, that the right to remove the building as a chattel did not require the tenants to retain the seizin or possession of the land, and that in a writ of entry it (this right) was no objection to a general judgment for the demandant, and a motion for a qualified judgment reserving to the defendants time to remove the building was denied. Wood v. County of Cheshire, 32 N. H., 421 (1855).

[For the purpose of sale of fixtures by a tenant it is immaterial that his right of removal at the end was conditioned upon a fulfillment of the

In order to entitle the lessee to the exercise of the right of removal secured to him by contract, he must, of course, have performed and kept all the covenants and conditions on his part to be performed and kept as conditions precedent to the exercise thereof, or must show his readiness to perform with the particular circumstances constituting a legal excuse of performance.[5]

stipulations in the lease. There resulted no authority to assume that the condition would be broken. Dryden v. Kellogg, 2 Mo. App., 87, 92 (1876).]

[Where the landlord has the option, at the expiration of the term, of requiring the tenant to replace a division wall or of taking the tenant's fixtures, the tenant, while having the right to make changes and substitutions from time to time in good faith, would have no right to dismantle the premises during the term. Loeser v. Liebman, 137 N. Y., 163 (1893), modifying 14 N. Y. Supp., 569, 571 (1891).]

[5] See 1 Chitty Plead., 321-326; *Ex parte* Morrow, 1 Lowell's Dec., 386 (1869); s. c., 2 N. B. R. (2d. ed.), 665; Mathinet v. Giddings, cited in note (*supra*). [West Coast Lumber Co. v. Apfield, 86 Cal., 335, 338 (1890).] Thus, where under a lease the lessee had a right to remove the building erected by him upon the premises at the end of his term, provided that all rents (which included the taxes on the premises) had been paid and all covenants on his part complied with, and the lessee offered to pay up all rents and taxes and quit possession, if the lessor would allow him to remove his improvements, and it was proposed to prove that the lessor refused to accept the offer, this was held insufficient. The lessee in such case should have paid what was due and kept his covenants, and then he might have removed his buildings without the permission of the lessor. Clemens v. Murphy, 40 Mo., 121 (1867). [See Willard v. Rogers, 54 Ill. App., 583 (1894); Milligan v. Drury, 130 Mass., 428, 430 (1881); Stamps v. Cooley, 91 N. C., 316, 320 (1884).] In Parker v. Goddard, 39 Me., 144 (1855), N. let certain lands and buildings to F. for six years, and also gave him a permit to detach an addition and erect another in its place, and "to take away or sell upon the ground said building so erected at his own expense at the determination of said lease after said restoration" [*i. e.*, of the building to its original condition] "has been made, but not before." The change was made and the new addition erected. After its erection and before the expiration of the lease, the lease was surrendered to the owner of the land and accepted. Before such surrender the lessee sold the new addition to plaintiff, who at a place distant from the premises, and before the six years had expired, but after such surrender of the lease, demanded of defendant, the owner of the land, the building to be taken away (and not merely to remove it from the original buildings so far that the latter could be restored to their original condition), and told him he was ready to comply with all the conditions of the permit. The defendant claimed the building as his own,

and said he should hold it by force if an attempt was made to remove it. *Held,* that for the purpose of complying with the conditions of the permit, no demand was necessary, and that without a compliance with such conditions, plaintiff could not legally remove the building, and that the claim to the building under the circumstances and nature of the demand was no evidence of a conversion. Afterwards the plaintiff in Parker v. Goddard, sold said addition to Adams, who again brought trover therefor, when it was *held,* that the addition so erected was personal property, and that such "permit" was not intended to limit the right to *sell,* but the right to *take away* the building; that after such building had become the property of a third person, the termination of the lease by the parties thereto did not affect his rights, and that he might remove it at the end of the term for which the lease was originally given; that where the plaintiff had done all he could reasonably be required to do to get possession of his property peaceably, by going to the premises for the purpose of removing the building and restoring the old buildings to their proper places, and such building was withheld under a claim of absolute ownership, it amounted to a conversion for which trover would lie. Adams v. Goddard, 48 Me., 212 (1859).

[Where the lessor sold to the lessee a dwelling-house situated upon the leased premises to be paid for in installments, with a provision that, upon default, the lessor could declare the contract forfeited, and the lease was long enough to allow the payment of all installments if paid according to the terms of the agreement, it is evident that the intention was that the house should not be removed until paid for; and, the lessee being in arrears, should not be permitted to remove the house so long as the lessor had a right to declare the contract forfeited, and it would be a matter of great inconvenience and expense to get the house back, if at all, after it was once removed, resulting in a denial of his option to forfeit. Davis v. Stark, 30 Kan., 565, 568 (1883).]

[Where a tenant has placed a plate glass front in a store under a contract permitting him to remove same if he will restore the front to its former condition, he will be enjoined from removing it, if it be shown that the building has been damaged by improperly putting in the front, and the tenant is insolvent. Levinski v. Williamson, 15 Texas Civ. App., 67 (1896).]

[The purchaser of a leasehold interest on execution takes it subject to the conditions. Snowden v. Memphis Park Ass'n, 75 Tenn., 225, 230 (1881).]

[Where lease provided that improvements should form a part of the realty, but that lessees might remove same by paying all rents, etc., the lessor is entitled to the improvements, upon forfeiture for non-payment of rent, as against a chattel mortgagee of machinery. Pendill v. Maas, 97 Mich., 215 (1893).]

[Where, under a provision in the lease, the landlord entered for default in the payment of rent, and took possession of the improvements made by the tenant, the landlord is not entitled to an engine sold to the tenant,

but not paid for, the seller having reserved title, and having had no knowledge of the provisions in the lease. Webster v. Bates Machine Co., 64 Neb., 306 (1902).]

[Where lessee is given the privilege of removal "when he shall have complied in full with the conditions of the above agreement," the right of removal does not depend upon the condition precedent of a compliance in full with the conditions, but merely postpones the right of removal until the conditions are complied with. If, therefore, the rent had been in arrears at the expiration of the lease, the lessee could not have removed the buildings until such rent had been paid. Whenever he did pay, even by suit at the end of the lease, his right to remove would become absolute. Cheatham v. Plinke, 1 Tenn. Ch., 576, 579 (1874).]

[Upon performance of the conditions by the tenants, their right of removal is complete; and, if the landlord prevents them from removing their property, they can bring trover therefor. Watts v. Lehman, 107 Pa. St., 106 (1884).]

[Where a lease provides that all buildings and improvements erected by the lessee shall be held and deemed as part and parcel of the realty and shall not be removed until the rent is paid, the landlord is not vested with a complete equitable title, but only the right to hold them until rent is paid; and if the landlord forecloses his lien for unpaid rent, the tenant should be given an opportunity to redeem within a reasonable time. Rooney v. Crary, 8 Ill. App., 329 (1880).]

[The right of the landlord to forfeit a building for non-payment of rent, may be waived. Lewis v. Ocean Pier Co., 125 N. Y., 341, 346 (1891), aff'g 3 N. Y. Supp., 911, 912 (1889).]

[Under a lease giving the tenant the right to remove improvements, rent was payable quarterly in advance, but the tenant never paid it punctually. The tenant held over several quarters. Eight days after an installment became due, the landlord gave notice to quit, whereupon the tenant tendered a quarter's rent. *Held*, that this would not create a forfeiture which would deprive the tenant of his right to remove buildings. Estabrook v. Hughes, 8 Neb., 496 (1879).]

[Where the tenant was obliged to pay taxes, and did so except a small amount for the last year, which he paid within a few days after the termination of his lease, and within the usual period when taxes are paid, and without any annoyance to the landlord, a forfeiture of the right to remove buildings can not be sustained. Allen v. Dent, 72 Tenn., 676, 680 (1880).]

[In Official Assignee v. Maxwell, 11 N. Z., 312, 317 (1892), where a lease for five years contained a covenant that the lessee should not remove any fixtures unless he should pay "not only rent to date, but as well the rent for the whole of the remainder of the term in advance," and the lessor entered for non-payment of rent, Prendergast, C. J., was of the opinion that if the assignee in bankruptcy had tendered rent up to the date of re-entry, that would have been to the end of the term within the meaning of the contract.]

*As we have already seen, if improvements or erections [*156] are so permanently connected with the buildings already upon the leased premises that they cannot be separated therefrom without material injury to the landlord's property, they ought not, *by the general rules of law, to be removed; and an [*157] agreement on the part of the landlord that the tenant shall have the right to take off and carry away any and all buildings, sheds, and other temporary houses and improvements which he may erect upon the premises, will not be construed to authorize the taking away of structures, the removal of which would cause material injury to the landlord's property.[1] This matter is, however, subject to the control of the parties by contract, and where such appears to be the clear intention of the parties in their contract, the removal of such annexations would doubtless be permitted, though productive of material injury to the inheritance, the injury in such case being attributable solely to the folly of the landlord, who might have protected himself from such consequences had he seen fit to do so.[2] Indeed, the tenant

[Where a lease gave the lessee a right to remove a cottage, and contained a covenant against underletting, this does not prevent an assignee of the lease, who appears not to have had any intent to defeat the lessor's rights, from removing the cottage after the expiration of the lease. Upton v. Hosmer, 70 N. H., 493 (1900).]

1 Powell v. McAshan, 28 Mo., 70 (1859). Napton, J.: "In such cases the property is not left in the same condition in which it is found. If a stranger so mixes up his property with mine that it cannot be separated without destroying or materially injuring mine, upon well settled principles of law and justice he must lose his property. This question ought to have been left to the jury." See, also, Stockwell v. Marks, 17 Me., 455 (1840). [See Butler v. Colwell, 89 Ill. App., 133, 137 (1900); Kuhlman v. Meier, 7 Mo. App., 260, 263 (1879).]

2 Where premises with the buildings thereon were demised "to be used for the purpose of a soda, saleratus, and drug factory and mill, and to use a steam-engine and furnace therein," the latter clause being designed to enable the tenants to introduce their engine and necessary vessels and apparatus, which was done by making an aperture in the wall and closing it up again and by removing stone steps leading to the basement, and the brick-work and masonry surrounding the boilers and the brick-work of the furnace were not connected with the walls of the building, except that the flue of the boiler was built into the chimney, and a few bricks of the furnace were run into the wall, and both were also secured by iron bolts running through the walls and fastened by nuts, and the pan in question was only set upon the furnace and the kettles were not let into the

may by the terms of his lease hold "without impeachment of waste," in which case his right of removing things annexed by him will be very extensive and almost without limit, this clause having the same effect in this relation as in the case of a conveyance of an estate for life.[3] The rights of the parties in such a case are not to be determined by the law of fixtures, but by a proper construction of the instrument containing the clause in question, a subject foreign to the purpose of this treatise.

[*158] *When the event contemplated in a lease, on the happening of which within a specified time the tenant's right of removing fixtures erected by him on the demised premises is to be modified or extended, does not take place, the rights of the parties in the absence of any other stipulation, affecting the question, are to be adjusted in accordance with the usual legal principles applicable to such cases.[4] And the fact that the

ground; *Held,* that the clause relative to the use of the engine, etc., involved the right to remove them (if removable fixtures) in the same way as brought in, if necessary; that the articles were not fixtures as between the landlord and tenant, but personal property, and an injunction to restrain their removal in the same way they were taken in was refused. Kelsey v. Durkee, 33 Barb., 410 (1861). The openings, however, in this case could be closed and the steps replaced without injury to the building.

[That the removal can not be effected without some injury to the freehold is not conclusive against the tenant's right to remove. Kuhlman v. Meier, 9 Mo. App., 595.]

[Where the lessee of a mill is given the right to remove such machinery as he has put in, he is also impliedly given the right to do some damage and injury to the freehold in making the removal, and he is not liable is he does no unnecessary damage. If he did, it should be counted on and proven. Hunt v. Potter, 47 Mich., 197 (1881).]

[Where a lease provided that the lessee might remove such improvements "as shall be capable of removal without injury to the land itself," it was held that the lessee might remove a brick building. London & S. African Co. v. DeBeers Mines (1895), A. C., 451.]

[3] See, 1 Cru. Dig., tit. 8, ch. 2, § 12 (1 Greenl., Cru. Dig., p. *233); 1 Wash. Real Prop., *117.

[4] Lemar v. Miles, 4 Watts, 330 (1835). The lease in this case contained a stipulation that in case the wells of certain salt-works failed within the term of three years, the tenants should be at liberty to take away all the metal and improvements of the works or be paid the value thereof at the choice of the lessor; but the contemplated event did not occur, and the right of removing trade fixtures was *held* not to be affected by this clause.

lease contains an agreement on the part of the lessor to sell the demised premises to the lessee, is said not to affect the right of the lessee to remove his trade fixtures.[5]

Covenants to Repair, etc., and to Yield Up in Repair, etc.

The effect upon the right of the tenant to remove annexations made by him upon the demised premises, of covenants to repair and to yield up in repair, etc., the demised premises; to repair and to yield up in repair the demised premises, and all erections, etc., to be thereafter erected and built thereon, and other similar covenants, has in various forms frequently come before the courts for determination; and it has often been made a question whether by such covenants the tenant was deprived of his privilege of removing fixtures, trade or otherwise, erected by him upon the demised premises after the *execution of the lease. The determination of the ques- [*159] tion in each case is a matter of interpretation and construction depending upon the facts of the individual case and the intention of the parties as shown by the contract, concerning which no other rules can be given than the general rules on the subjects of interpretation and construction.[6] It will, however, throw some light upon the subject to review the decisions that have been made upon the questions under consideration, though they do not seem susceptible of a very rigid classification.

As to the effect without more of a simple covenant to keep the demised premises in repair during the tenancy and to yield them up in repair at the expiration of the term, unless there

[5] Holbrook v. Chamberlin, 116 Mass., 155 (1874).

[6] See these rules well collected in Blackwell on Tax Titles, 595 *et seq.*; also 2 Pars. Cont., 491 *et seq.*

[A covenant to leave the premises in good repair is qualified by a provision permitting the removal of a building. Gray v. McLennan, 3 Man., 337, 343 (1886).]

[Altering a house so that it is substantially new, is not a violation of a covenant in a lease that the house should not be removed, where the manifest object of the covenant was to protect the lessor, and the new improvements furnish more than double the security which he had in the old; and the lessor will not be allowed to forfeit the lease when he knew of and made no objection to the erection of such lasting improvement. Hawes v. Favor, 161 Ill., 440 (1896).]

are special words including in the terms of the demise subsequent erections made during the term, or unless in some other way an intention is manifested to include within the terms of the covenant such subsequent annexations, it will ordinarily be construed to relate only to such articles as formed a part of the demised premises at the time of making the demise, and to such irremovable fixtures as have been subsequently annexed to and form a part of the realty, and will not extend to and prohibit the removal of the tenant's domestic or trade fixtures.

In Deeble v. McMullen,[7] the lessee covenanted "for himself, his heirs and assigns, to repair, maintain, uphold and keep, during the tenancy, the said mill and premises with the appurtenances, with all needful and necessary reparations and amendments, and to yield them up in such repair at the deter- [*160] *mination of the tenancy of the lessor, his heirs and as-

[7] 8 Ir. Com. Law, 355, 359 (1857).

See, however, Brown v. Blunden, Skin., 121 (1694): "Covenant in a lease to repair, etc., *praedimissa* from the time of the lease to the determination thereof, and so well kept in repair shall give up at the end of the term, not saying from time to time; afterwards the lessee builds a malt-house, and if the covenant shall extend to it, was the question, and holden, that it should in this case, for it is a continuing covenant; and though the house had no actual, yet it had a potential being at the time of the lease. Judgment *nisi.*"

[A covenant to keep all buildings in repair has reference to those upon the premises when the lease was executed, and such others as might be erected by the lessor. Brown v. Reno Power Co., 55 Fed., 229, 235 (U. S. C. C., Nev., 1893).]

[If an ambiguous term is used, such as the term "fixtures," a term capable of two meanings, the court should adopt that meaning which will work the least injustice. Argles v. McMath, 26 Ont., 224, 237 (1895); and in 23 Ont. App., 44, 47 (1896), affirming this case, it was *held* that a covenant in a lease to yield up the premises "together with all buildings, erections and fixtures" refers only to what the lease demised of the landlord's property, and not to the trade fixtures of the tenant.]

See Pyot v. St. John, Cro. Jac., 329 (1609), where it was *held* that carrying away a shelf, though not stated to be fixed, was a breach of a covenant to leave in repair; "for it shall be intended fixed."

[Where there was a covenant to leave the premises in repair, and the lessee put down a floor to protect the existing floor from injury from roller skates, this implies that he will not leave the floor at a higher elevation than he found it, and the floor would be a tenant's fixture. Howell v. Listonville Rink Co., 13 Ont., 476, 492 (1886).]

signs;'' but this covenant was not considered by the court as varying the rights of the parties in relation to trade fixtures (millstones and machinery in this case), though the case was decided upon another ground.

Where, however, upon a proper construction of the covenant to repair and yield up in repair, etc., such appears to be the intention of the parties thereto, such covenant may have the effect to prohibit the removal of annexations made by the tenant subsequently to the making of the demise, or purchased from the outgoing tenant and otherwise removable.[8]

[8] In Rex v. Topping, McClel. and Y., 544 (1825), various engines and other fixtures used in mining and smelting were standing on the premises at the date of the demise, of which the *engines* were purchased by the incoming from the outgoing tenants, and were not mentioned in the general words of the demise, nor in the clause of re-entry. But the lessees covenanted to keep the ''*said engines*'' (the word ''engines'' not having occurred before) in good and tenantable repair, and *the same* in such state to yield up at the end, or other sooner determination of the term. The lessor covenanted that the lessees might remove (at the end of the term or sooner, *except as in the cases and events before mentioned*, in any of which, the property being extended or taken in execution being one, it was made lawful for the lessor to re-enter as into his *first or former estate*) all such engines, etc., as had theretofore been erected, and all such as should by themselves be erected for carrying on the *smelting* business. By other covenants the lessees covenanted to build an engine on the *mining* premises; and the lessor, that the lessees might at any time during the term, or within twelve months after the expiration, or other sooner determination thereof, remove all such engines as last mentioned, unless the lessor should wish to re-purchase the same. The lessees built one engine and part of another during the term: *Held*, that upon the forfeiture of the demise by the taking upon a writ of extent, the lessees had lost their right to remove any of the fixtures, and that they all belonged to the lessor, such being the intention of the parties as collected from the covenants.

So, under a lease of vacant ground at a nominal rent ($1.00 per year), upon the condition and covenant on the part of the lessees to erect a valuable building thereon (known as the ''Crystal Palace''), and at the expiration of the term to surrender the premises in as good state and condition as reasonable use thereof will permit, damages by the elements excepted, there being no reservation to the lessees of a right to remove said building, such building belongs to the lessors at the expiration of the term, and hence they have an insurable interest. Mayor, etc., of N. Y. v. Hamilton Fire Ins. Co., 10 Bosw., 537 (1863); Mayor, etc., of N. Y. v. Brooklyn Fire Ins. Co., 41 Barb., 231 (1864); Mayor, etc., of N. Y. v. Exchange Fire Ins. Co., 9 Bosw., 424 (1862); s. c., 3 Abb. Ct. App.

[*161] *The question sometimes turns upon what are to be considered repairs, and what fixtures, within the meaning of the covenant.

In Sunderland v. Newton,[1] the lessee of a mill and a steam-engine therein, covenanted during the continuance of the demise to keep in good repair the mill; and also the steam-engine, with the boilers, etc., renewing at his own expense such parts

Dec., 261 (1867). The first two cases were respectively affirmed on other grounds in 39 N. Y., 45; 3 Abb. Ct. App. Dec., 251. See, however, *Ex parte* Goreley, 13 W. R., 60 (1864); s. c., 10 Jur. (N. S.), 1085, cited *ante*, p. *78.

[Where a lease of a vacant lot contained a covenant by the lessee to build, and one that, on the expiration of his term, he would surrender the demised premises in as good state and condition as reasonable use and wear would permit, it shows an intention to make the building a part of the realty. Deane v. Hutchinson, 40 N. J. Eq., 83, 88 (1885).]

[A covenant that tenant will leave premises "in as good condition as the same now is or may be made by improvements," binds him to leave buildings erected by him. Carver v. Gough, 153 Pa. St., 225, 229 (1893).]

[A covenant, at all times during the term, to repair, support, amend and keep the premises with all necessary reparations and amendments whatsoever, and the said premises so repaired, with the appurtenances and all things, which at the time of the execution of the indenture were, or at any time during the term, should be fixed or fastened to or set up in or upon the premises, and at the expiration of the term peaceably yield up to the lessor, with all and singular the fixtures thereto belonging, in as good condition as the same were at the execution of the indenture, reasonable use excepted, covers small buildings resting upon blocks of wood, stumps and scantlings, placed upon the premises during the term. Allardice v. Disten, 11 Up. Can. C. P., 278.]

[For additional cases holding that the effect of covenants was to prohibit the removal of improvements made by tenants, see West Coast Lumber Co. v. Apfield, 86 Cal., 335, 339 (1890); Western & Atlantic R. R. Co. v. State, 14 L. R. A., 438, 452 (Ga. Spec. Com., 1891); Brown v. Ward, 119 Iowa, 604 (1903); Davy v. Lewis, 18 Up. Can. Q. B., 21; Donkin v. Crombie, 11 Up. Can. C. P., 605; and *ante*, p. *153.]

So, where the lessee covenanted to keep in repair and to deliver up at the end of the term in like condition as when taken, etc., it was held that a box stall erected by him could not be removed if its removal would injure the freehold. Murray v. Moross, 27 Mich., 203 (1873).

[Where the tenant is obliged to make "all needed repairs," he acquires no right to improvements made by him which are necessary for other reasons than wear and tear. Ashby v. Ashby, 59 N. J. Eq., 547, 559 (1900).]

[1] 3 Sim., 450 (1830).

thereof as should be broken or damaged beyond the unavoidable deterioration occasioned by reasonable wear and tear; and the same so kept in repair and renewed at the expiration of his term to deliver up to the lessor. During the term, for the purpose of increasing the power, the tenant removed and disposed of all the works of the engine except the fly-wheel, fly-shaft, and boiler, and made alterations in its machinery, converting it from an engine of ten horses power into one of twenty horses power upon an improved principle, and the substituted engine was considered by the court as only an extensive repair of the old engine, and subject to the stipulations in the lease; and the assignees in bankruptcy of the tenant were enjoined from removing the new parts of the engine, subject to an action to be brought by the lessors to try the right.

In Mason v. Fenn,[2] A. leased to B. *et al.*, a flouring mill for a term of years, the lessees covenanting to restore the premises in as good repair as received, natural wear and fire only excepted. The lease also contained a provision that be*sides [*162] certain repairs to the floor and in putting in a new set of wheat elevators, which were to be done by the lessees and the expense thereof deducted from the rent, "other fixtures the said parties of the second part may put in said mill beneficial to the same," at the expiration of the term were to be paid for by the landlord or the tenants might remove them. The tenants were obliged during the term in order to run the mill to put in a new boiler, back-stand and mud-valve. The opinion of the court was delivered by Treat, C. J., who, referring to this branch of the case, said: "We agree in opinion with the circuit judge, that

[2] 13 Ill., 525 (1852). In Darby v. Farrow, 1 McCord, 517 (1821), upon an agreement to rent house and lot, out of the rent of which was "to be deducted any repairs that may be done to the same," the court *held*, that the erection of a shed to the stable, a fowl-house, and——house were not repairs.

[Where the lessee, at the request of the lessor, and on the latter's promise to pay for the work, constructed a barn, using an old house upon the farm in part construction, and removed three additions to the dwelling-house, and converted them into tenements, the lessor can not escape liability because the lease requires the lessee to "repair" and "improve" the property, as the covenants did not embrace the erection of new buildings whether built of new or old material. Naye v. Noezel, 50 N. J. Law, 523 (1888).]

the articles in question were fixtures within the agreement of the parties, for which compensation was to be made by the landlord, or the tenant might remove them at the expiration of the term. They were clearly of a beneficial character, for without them the mill could not be used. The old boiler became worthless, and it was absolutely necessary to the enjoyment of the demised premises that a new one should be procured. We are not inclined to hold that the landlord had the right to retain the articles, because the tenant covenanted to restore the premises in as good a state of repair as he received them, with the exception of natural wear and casualty by fire. The parties could hardly have contemplated such extensive expenditures in the way of reparations. It was their intention that the tenant should incur all necessary expense in keeping the buildings and machinery in repair; not that he should be compelled at his own cost to erect buildings, and provide new engines and boilers in the place of those that could not be repaired. For any additions to the property in the way of repairs, the tenant could not demand compensation, nor could he detach the materials used and take them away. But the old boiler, without any fault on his part, became incapable of being repaired, and without a new one the mill would not operate. It was not his duty, under such circumstances, to furnish a new boiler at his own expense for the benefit of the landlord. The articles in question were entirely new, and were put in the mill for the temporary convenience of the tenant, and they could be removed without detriment to the mill and without injury to the landlord. The agree- [*163] *ment secured the tenant compensation for these improvements or the right to take them away at the end of the term."

The effect of a covenant to repair and to yield up in repair the demised premises and all erections, etc., to be thereafter erected and built thereon, has also been considered in a number of cases. In Naylor v. Collinge,[1] the lessee had covenanted

[1] 1 Taunt., 19 (1807). See, also, Thresher v. East London Water Works, 2 B. & C., 608 (1824); s. c., 4 D. & R., 62, where it was *held*, that lime kilns erected with brick and mortar with their foundations let into the ground, were buildings within the meaning of a covenant to repair buildings.

Where in the lease of a farm the tenant covenanted to keep and sur-

that he would, during the continuance of the lease, at his own proper costs and charges, well and sufficiently repair, etc., the said messuage or tenements and premises, and all erections and buildings then already erected and built, as also all other erections or buildings that might thereafter be erected and built upon the premises, and the same premises in such good and sufficient repair would at the end or other sooner determination of his term peaceably, etc., yield up, etc.; and it was held by the Court of Common Pleas that the covenant included erections and buildings erected, built and used on the demised premises by the tenant for the purpose of trade and manufacture only, where such erections were let into and fixed to the soil and freehold; but not erections and buildings so erected and used for trade purposes, but which were not let into the ground or freehold, but were built and supported on blocks or pattens of wood laid upon the ground, which latter were held to be mere chattels and not erections or buildings within the meaning of the covenant.[2] It was urged by counsel *in this case, with reference to the buildings let into the [*164] soil, that it was not the intention of the parties by this covenant to restrain the operation of the general rule as to the removability of buildings erected by the tenant for trade purposes; that the object of the covenant was merely to provide that those buildings which the tenant was bound by law to leave on the

render in repair the demised premises and all erections, buildings, etc., to be erected thereon, and during the term the tenant, with the permission of the landlord who was the lord of the manor, built a house and farm buildings on the waste adjoining the farm and not included in the original demise, and held and enjoyed the same down to the termination of the lease: *Held*, that though there was no liability at law, yet in equity the permission to build was equivalent to permission that the thing built should be treated as part of the original demise and subject to all the conditions, covenants and agreements applying to the property originally demised, and that the tenant was under obligation to keep such house and farm buildings in repair. White v. Wakley, 26 Beav., 17 (1858); s. c., 28 L. J. (N. S.), Chanc., 7.

2 See, also, Dean v. Allalley, 3 Esp., 11 (1799), where certain sheds called "Dutch barns" were held not to be included within a covenant to leave in repair all "buildings" erected or to be erected, etc. Lord Kenyon, in that case, said: "It (the covenant) means that the tenant shall leave all those buildings which are annexed to and become part of the reversionary estate." [See Plamondon v. Lefebvre, 3 Que. L. R., 288 (1877).]

premises, should be left in a proper state of repair; but the court interposing, observed, that the parties were precluded from all general argument by the express words of the covenant; that the defendant, in order to succeed upon this part of his case, must prove that erections and buildings raised for the purposes of trade were not in fact erections and buildings. If the tenant meant to exclude buildings of this nature, it should have been so expressed, but that the court could not go out of the covenant. The correctness of the decision of Naylor v. Collinge seems unquestionable so far as regards the first branch of the case, it being impossible to say that erections and buildings raised for the purposes of trade only, are for that reason any less erections and buildings. With reference to the second branch of the case, while it seems clear that such a covenant, or a covenant to redeliver possession with all fixtures, etc., would not in general include mere chattels not coming literally within the words of the covenant,[3] yet it is difficult to [*165] *understand why the "erections and buildings" in question, coming as they do exactly within the words of the covenant, are any less erections and buildings on account of their being built upon and supported by blocks or pattens of wood

[3] See Holbrook v. Chamberlin, 116 Mass., 155, 162 (1874); *Ex parte* Morrow, 1 Lowell's Dec., 386 (1869); s. c., 2 N. B. R. (2d. ed.), 665, furniture consisting of sets of drawers fitted but not fastened to the shop.

See, however, Duke of Beaufort v. Bates, 3 DeG. F. & J., 381 (1862); s. c., 8 Jur. (N. S.), 270; 10 W. R., 200; 6 L. T. (N. S.), 82 (reversing s. c., 10 W. R., 149; 5 L. T. (N. S.), 546). In this case the lessees covenanted to uphold and keep in good repair the furnaces and other works, houses and other buildings then standing or to be erected on the demised premises, and at the expiration of the term to deliver up the coal and iron-works and mines, etc., and all ways or roads in, upon, or under the same lands respectively, in such good repair, order, state and condition as that the said coal and iron-works may be continued and carried on by the said Henry, Duke of Beaufort, etc.; and it was *held*, that the tram plates and wooden sleepers on which the tram plates lie or are fixed, not being fixed to the freehold farther than they were sunk in the soil by the pressure of the wagons passing over them, were mere trade chattels and were not included by the words "roads and ways," which may exist without sleepers and tram plates; and therefore, the lessor was not entitled to an injunction to prevent their removal by a judgment creditor of an under-lessee.

laid upon the ground. However, as was well observed by Lord Justice Turner in Duke of Beaufort v. Bates, it seems clear that a lease ought not to be construed so as to take away the ordinary legal right of a tenant to remove trade chattels unless such an intention is clearly expressed.

Where the trade fixtures are other than buildings (*e. g.*, mere utensils, or machines), the words of the covenant remaining substantially the same, the question becomes more difficult.

In Holbrook v. Chamberlin,[4] a covenant by the lessees of a mill, "to deliver up the premises and all future erections or additions to or upon the same," at the end of the term, "in as good order and condition as the same now are or may be put into by the lessor," was held to be limited in purpose and effect

[4] 116 Mass., 155 (1874). In this case, the fact that the lease contained an agreement on the part of the lessor to sell the premises to the tenants, was not considered as affecting the rights of the lessees to remove trade fixtures during the term. As to the point stated in the text, see, however, Bidder v. Trinidad Petroleum Co., 17 W. R., 153 (1868); cited *post.*

[By provisions in an original lease or subsequent renewals, sub-leases and assignments, the lessee was to erect cotton-mills which were subsequently changed to flouring-mills, and, by covenant, the tenant was bound "to keep or cause to be kept the said mills and the works and machinery therein, and belonging thereto, in working order, repair and condition; and at the determination of the demise to yield up the demised premises, and all buildings and improvements thereon, in the like good and sufficient tenantable order, repair and condition." *Held,* that the tenant could not remove anything originally demised, nor any substituted machinery; but could remove trade fixtures introduced as improved methods to fulfill functions formerly performed by manual labor or movable utensils, Cosby v. Shaw (1887), 23 L. R., Ire., 181, varying 19 L. R., Ire., 307.]

[Where a lessee agreed to convert the premises into a theater and surrender all additions, alterations and improvements, it was held that this did not include chairs fastened to the floor by screws, at least as against an unpaid seller holding a mortgage thereon. Metropolitan Concert Co. v. Sperry, 9 N. Y. St. Rep., 342 (1887), aff'd 120 N. Y., 620 (1890).]

[A lessee covenanted to deliver up the premises at the end of the term "and all future erections and additions to or upon the same." He placed in the store three dynamos, two rheostats, two ampere meters, one volt meter, and one lighting dynamo. *Held,* that the machinery was not "erections or additions." Liebe v. Nicolai, 30 Ore., 364, 369 (1897).]

[Where the tenants are to repair and yield up "the demised premises," and the contract shows that fixtures are not a part of the demised premises, the lessees' right of removal is not affected. Busby v. Joseph, 7 N. S. W., Supr. Ct., 200 (1868).]

to new buildings erected, or old buildings added to such building, and not to be extended so as to deprive the tenants of the right to remove trade fixtures (consisting of counter-shafting, pulleys, hangers and belts, a portable boiler and steam pipes), much less personal property put by them upon the premises during the term. This case was distinguished from Naylor v. Collinge, *supra,* in this in that case the things removed were "buildings" coming within the very words of the covenant.

On the other hand, though such conflict seems more apparent than real, there are some cases which seem to maintain a [*166] *contrary doctrine;[1] and doubtless the right of a tenant to remove trade or other removable fixtures, or even mere chattels, may be qualified or even entirely taken away by the covenants in the lease, where, by a proper construction of the instrument, such appears to be the intention of the parties.[2] This

1 See the cases cited in the following notes.

2 See *Ex parte* Morrow, 1 Lowell's Dec., 386 (1869); s. c., 2 N. B. R. (2d. ed.), 665, where a stipulation that the premises should be "used as a boot and shoe store, and all fixtures of every description are to be put into said premises by said lessee at his own expense," with the right to remove at the end of the term such as could be moved without injury to the premises, provided the lessee should have kept all his covenants, but otherwise not; and that none of them should be removed during the term without the consent of the lessor, was *held,* to allow the removal of trade fixtures, consisting of gas fixtures and shelving, only on payment of the arrears of rent.

Where a lease was made to an oil refiner, of land, "and also the erections and buildings then already erected and to be erected and built" thereon, and the lessee covenanted to expend 2500*l.* in such buildings thereon, which were to be of a permanent character, and to keep the demised property in repair, and deliver the said premises up at the end of the term, together with all the doors, wainscots, etc., "pumps, pipes, cisterns, and other things which now are or at any time during the said term shall be fixed or fastened to the freehold of the said premises, or belong thereto." *Held,* that these words included retorts, cisterns, and other trade fixtures of the oil refinery, which consequently could not be removed by the lessee. Bidder v. Trinidad Petroleum Co., 17 W. R., 153 (1868). See, also, Dumergue v. Rumsey, 2 H. & C., 777 (1863); s. c., 12 W. R., 205; 33 L. J. (N. S.), Exch., 88; 10 Jur. (N. S.), 155; 9 L. T. (N. S.), 775; Stansfield v. Mayor of Portsmouth, 4 C. B. (N. S.), 120 (1858); s. c., 4 Jur. (N. S.), 440; 27 L. J., C. P., 124, where a distinction was made in the lease between two species or sets of fixtures, it being stipulated in effect that one set should go to the lessors and the other to the lessee.

effect is sometimes produced by the use in such covenants of other terms, or terms more comprehensive in their meaning than the term "fixtures." Thus, the term "improvements," as between lessor and lessee, has been held to have more comprehensive meaning than "fixtures," and to include the latter.[3]

[For additional cases denying the lessee the right, under his covenant, to remove trade fixtures, see Switzer v. Allen, 11 Mont., 160 (1891); Scott v. Haverstraw Brick Co., 16 N. Y. Supp., 670 (1891), aff'd 135 N. Y., 141; Allen v. Gates, 73 Vt., 222, 227 (1900); and, *ante*, p. *153.]

[Where a grist mill was devised to one with a privilege to another to occupy it for rent, the latter to "keep the said property in good repair at his own proper cost," *held*, that the tenant could not remove substituted machines although better than the old, and only annexed enough to keep them steady. Ashby v. Ashby, 59 N. J. Eq., 536 (1900).]

[Where the lease requires the lessee to erect a building, it is not removable, although ordinarily it might be. Boyd v. Douglas, 72 Vt., 449.]

[A lease provided that all trade fixtures should be delivered up at the expiration of the term. A sub-lease provided that all landlord's fixtures should be delivered up at the expiration of the term. The sub-lessee was not aware of the covenant in the superior lease, and placed green-houses and other fixtures upon the land, which were claimed by the superior landlord. *Held*, that there was no implied covenant by the sub-lessor that there would be no interference with these fixtures. Porter v. Drew (1880), 5 C. P. D., 143.]

[3] In Martyr v. Bradley, 9 Bing., 24 (1832); s. c., 1 L. J. (N. S.), C. P., 147; 2 Mo. & Sc., 25, the tenant took a lease of a water corn-mill, together with two pair of mill-stones, machines, gear-works, running tackle, etc., in or affixed to the mill, and covenanted to keep the premises in repair, and the said water corn-mill, etc., and other premises demised, at the end of the demise peaceably to yield up, "together with all locks, bolts, bars and other fixtures, fastenings and improvements which then were, or which should or might at any time or times during the continuance of that demise be fixed, fastened or set up in, upon, or about the premises or any part thereof, in good plight and condition, reasonable use and wear only excepted." During the term the tenant substituted two new French mill-stones for two old ones which he had found on the premises; the lower stone was rammed in and fixed with mortar, and the upper revolved on its axis. When he left the premises he took away these new stones and left in their place the old ones. *Held*, that the word "improvements" included the new mill-stones which might not be removed by the tenant, notwithstanding it was the general custom for tenants to remove such stones. See, also, Rex v. Hungerford Market Co., 4 B. & Ad., 596 (1833), where, under the Act 11 G., 4, c. 70, empowering the defendant company to purchase certain estates, and providing for compensation for injury to improvements, tenant's fixtures, etc., it was *held*, that where the lease contained covenants to yield up the premises in repair, with all fix-

tures and improvements, the assignee of a lease turned out after the expiration of the tenancy having no legal interest in the tenant's fixtures, was not entitled to compensation under the act.

So, where the lessees of premises known as Castle Garden, "covenanted at the end of their term to surrender to the lessors the demised premises," and "all *improvements* that may have been placed thereon by the said parties of the second part" [the lessees], "which improvements are to belong to said parties of the first part" [the lessors], etc., it was *held*, that such covenant included "gas-pipes, burner, gas-ladders, and two large and one small meters, lumber in hat room, fifteen batten doors, hinges and locks, floor of stage, large glass case, benches in gallery, benches under gallery, upholstered wood-work and canvas constituting the stage, gas-pendant, under-gallery, picket fence on the bridge leading to the garden, sheds on the north and south sides of the building, fixtures and ticket office, board fence on the north side of the building." French v. The Mayor, 16 How. Pr., 20 (1858); s. c., 29 Barb., 363. Davies, J.: "Improvements, clearly, in the lease here used, embrace every addition, alteration, erection or annexation made by the lessees during the demised term to render the premises more available and profitable or useful and convenient to them. It is a more comprehensive word than 'fixtures,' and necessarily includes it and such additions as the law might not regard as fixtures. It would be difficult to select a more comprehensive word; and where the parties say that all improvements which may be placed on the premises shall belong to the lessors, it is difficult to say what, if anything, would be excluded." West v. Blakeway, 2 M. & G., 729 (1841); s. c., 3 Scott N. R., 199; 9 Dowl. P. C., 846; 5 Jur., 630, was relied on as an authority for the above decision. In this case the lessee covenanted to yield up the demised premises at the expiration of the term, together with all *erections and improvements*, which, during the term thereby granted, should be erected, made or set up. The lessee, during the term, erected upon the demised premises a green-house built of wood, on a frame fixed upon a plank of wood called a plate, which was laid upon mortar placed in the indents of dwarf walls erected for the front and sides, the back being formed by an old wall. No holes were made in any part of the walls, the green-house being erected with a view to removal. Before the termination of the term, the lessee removed this green-house, leaving the walls and ground flues and doing no injury to the premises. *Held*, that the green-house was an erection and improvement within the meaning of the covenant. Coltman and Erskine, JJ., also expressed the opinion that it was a fixture.

So, a tenant of a house covenanting to repair and keep in repair the premises and all erections, buildings and improvements which might be erected thereon during the term, and to yield up the same in good and sufficient repair, may not remove a veranda erected by him during the term, the lower part of which is attached to posts fixed in the ground. Penry v. Brown, 2 Stark., 403 (1818).

So, where a lease contained a covenant at the expiration of the term to

yield up the premises, "together with all wainscots, *windows*, shutters, fastenings, etc., and other things which then were, or thereafter should be thereto affixed or belonging (looking-glasses and furniture excepted); and together also with all sheds and other erections, buildings and *improvements* which should be erected, etc., upon said demised premises, in good repair," etc., and an assignee of the lease removed the ordinary shop sash window and put in its place a plate-glass shop front or window, which was brought to the house completely made and secured in its place by wooden wedges, no screws, nails, or glue being used in fastening it to its place, and it being capable of being removed entire by removing the wedges. *Held*, that though not a fixture in the ordinary sense, yet if not a window belonging to the demised premises, within the meaning of the covenant, it was at all events an improvement and not removable. Haslett v. Burt, 18 C. B., 893 (1856); s. c., 2 Jur. (N. S.), 974, 25 L. J., C. P., 295; affirming s. c., in C. P., 18 C. B., 162; 25 L. J., C. P., 201; 36 Eng. L. & Eq., 276.

So, a steam engine fastened to a frame of timber bolted or spiked to timbers bedded in the ground, used in working a quartz ledge, has been *held*, to be included within the stipulation in a lease that improvements that may be put up on the ground for working the lead shall go to the lessor on the termination of the lease if the rent is not paid, or if lessee declines to purchase the premises in accordance with a stipulation therefor in the lease. Merritt v. Judd, 14 Cal., 59 (1859). See, also, Gett v. McManus, 47 Cal., 56 (1873). In Merritt v. Judd it was also *held*, that the lessor's right to the fixture was not destroyed by the tenant's contracting to purchase by taking a bond for title on payment of the purchase money, which, however, he failed to pay.

See, however, Lemar v. Miles, 4 Watts, 330 (1835), where the opinion was expressed that "metals and improvements" did not include an article so decidedly personal as an engine.

But where tenants covenanted to make "alterations, additions and improvements of a permanent character" upon the demised premises to the value of at least $1,500, "and to introduce machinery necessary to the purposes of the business," "the permanent additions and improvements to remain on the property at the expiration of this lease, and to belong to the owners of the fee of the said premises;" and the tenants put up a building twenty-four feet by sixty, three stories high costing $2,200, and also an engine screwed into a separate foundation, and otherwise fastened to the building, a boiler outside the main building, shafting and other articles. *Held*, that the building satisfied the covenant, and that the engine, boiler, etc., were trade fixtures removable by the tenant during his term, and hence subject to sale on execution against him, and removable by the purchaser during the term. Hey v. Bruner, 61 Penn. St., 87 (1869). See, also, Birch v. Dawson, 6 C. & P., 658 (1834); s. c., 2 Ad. & E., 37; Bidder v. Trinidad Petroleum Co., 17 W. R., 153 (1868). In the case last cited, an agreement was made between the plaintiff and the defendant company to grant them a lease of certain land as soon as they had expended 3000*l.*

"in the erection of permanent and substantial brick or stone and slated, or brick or stone and tiled buildings and works, such as are usually erected for the distillation of oil," and it was also provided that the lease should contain a covenant to cover in the said "erections and buildings" when necessary; the lease was also to contain a covenant to keep all the erections and buildings for the time being standing on said lands in good repair during all said term, and to deliver up the demised premises at the end of the term. *Held*, that "erections" must mean other things than mere brick or stone buildings, and included cisterns bricked up to the brim.

[In Parker v. Wulstein, 48 N. J. Eq., 94 (1891), shelves nailed to the walls and supported by counters, a furnace and flues, and awnings, although easily removable, and probably not fixtures, were held to be improvements; and, under a stipulation in the lease, to belong to the landlord. Said Bird, V. C.: "The word 'improvement' may be said to comprehend everything that tends to add to the value or convenience of a building or place of business, whether it be a store, manufacturing establishment, warehouse or farming premises. It certainly includes repairs of every description. It necessarily includes much more than the term 'fixtures.' Indeed, so far as I am able to understand, it is difficult to conceive any additions made to a building by a tenant for his own convenience in the conduct of the business which may not properly be included in the term 'improvements.'" See, further, as to the term "improvements," Lake Superior Iron Co. v. McCann, 86 Mich., 106, 111 (1891); Hopkins v. Gilman, 47 Wis., 581 (1879); Poertner v. Russel, 33 Wis., 193 (1873); and, *ante*, p. *7.]

[Stalls or partitions affixed by screws, cleats and slides in a shed are "improvements" within a covenant. Lesser v. Rayner, 47 N. Y. Supp., 1102 (1897).]

[Where a tenant was to do repairs, but to be paid for "permanents and betterments," *held*, that a picket-fence was a permanent improvement. Wisehart v. Grose, 71 Ind., 260, 263 (1880).]

[Where a lease provided that "alterations and improvements" were not to be removed, a boiler costing four thousand dollars comes within that description; and a subsequent parol license to remove it must be very clearly established. Agnew v. Whitley, 10 Phila., 77 (1873).]

[Where a lease provided that whatever alterations and improvements were made by the tenant should become the property of the landlord, and the tenant put in a paneled mahogany ceiling connected with the bar fixtures and side walls so as to constitute one piece, and also put in a marble floor and toilet fixtures, with marble slabs and platforms, the court held that while the tenant might ordinarily have removed the bar fixtures, he could not do so in this case, as he had made them a part of the ceiling and wainscoting, which, under the covenant, were permanent improvements. Center v. Everard, 43 N. Y. Supp., 416 (1897).]

[Where a lease provides that "alterations and improvements" made by the tenant shall belong to the landlord, and the landlord consents to

a sale of certain fixtures annexed by the tenant, this shows that the parties have not classed those fixtures as "alterations and improvements." Whitney v. Shippen, 89 Pa. St., 22, 26 (1879).]

[A lessee covenanted to leave "any alterations, repairs or improvements." He bought a set of bar furniture; and, to secure payment of the purchase price, gave a chattel mortgage thereon and on the chandeliers, gas and electric light fixtures already upon the premises. The bar furniture was afterwards affixed by screws, and holes were cut in the floor to let pipes through and the pipes were attached to the bars, but all of the articles were stock articles, and could be removed without serious damage to the freehold. *Held*, that the bar fixtures were covered by the mortgage, and not by the covenant in the lease, but otherwise as to the gas and electric light fixtures. An improvement from its very nature becomes a part of the realty, as a house. It is done to the realty. A fixture retains some of the essential incidents of a chattel though annexed to the realty. Said Grey, V. C.: "The presence in the saloon of the bars and their equipment is an improvement in the same sense that the room is improved by the presence of the chairs, tables and carpets." Ames v. Trenton Brewing Co., 56 N. J. Eq., 309 (1897), aff'd 57 N. J. Eq., 347 (1898).]

[Where a tenant purchases the fixtures of the preceding tenant, and the new lease contains a clause that all improvements put upon the premises by the tenant shall be left for the benefit of his landlord, such fixtures are not within the letter nor spirit of the covenant, as they were not put in by him, but were his personal property before the lease was made. "While the terms 'improvements and additions' are comprehensive, they ordinarily refer to changes and additions made to the freehold." Smusch v. Kohn, 49 N. Y. Supp., 176, 178 (1898).]

[A lease of a factory contained a covenant that the lessee would not make any alteration without the consent of the landlord under penalty of forfeiture. The engine becoming worn out, the lessee substituted a new one without the consent of the landlord. *Held*, that this was not an alteration, and the lessee could remove it. Andrews v. Day Button Co., 132 N. Y., 348 (1892), aff'g 62 Supr. Ct. (55 Hun), 494 (1890).]

[If a lessee of land on the shore of the ocean builds a wharf and chute, part being upon the demised premises and part extending out into the ocean, such portion of the wharf as extends below high water mark is neither an improvement, nor affixed to nor appurtenant to the land, and does not become the property of the lessor at the expiration of the term under a provision in the lease that the land is to be surrendered with improvements erected thereon. Coburn v. Ames, 52 Cal., 385, 395 (1877).]

[One clause in a lease gave the lessee the right to remove buildings erected by him, and another clause provided that all alterations and additions made to a frame building then on the premises should inure to the benefit of the lessor. The lessee fitted up this building as a factory, and at one end built a brick building to accommodate the engine and boiler which furnished the motive power for the factory. The two buildings were not connected, but their roofs touched; a doorway was cut in the

[*167] The *mere removal and sale, however, by a tenant during his term, of removable fixtures (not removed in such a way as to amount to a non-repair) which he does not immediately restore, but which might be restored before the end of the term, [*168] *is not a breach of a covenant to repair, uphold and amend the demised premises, and to deliver them up at the end of the term, together with all improvements, and things fixed and fastened or to be fixed and fastened thereto.[1]

[*169] *The construction to be placed upon such covenants is sometimes determined by an application of the principle that general words are restricted by the particular words which precede them, and come within the rule by which they ought to be construed as applicable to persons and things *ejusdem generis*.[2]

This rule was applied in the decision of Bishop v. Elliot,[3] [*170] *by the Court of Exchequer Chamber. In that case C. demised to E., the plaintiff, an unfinished messuage for a long term of years. The indenture contained a covenant by the plaintiff that at the expiration of his term he would deliver up

old building opposite a door in the new building; and the old building was not clapboarded next to the new building. The question being raised as to which clause covered the new building, it was held that the lessee had a right to remove it. Smith v. Whitney, 147 Mass., 479 (1888).]

[Where a lease provided for the surrender of the premises "in as good state and condition as reasonable wear and use thereof will permit," and also permitted the making of alterations which would convert a dwelling-house into a shop, this did not prevent the removal by the tenant of shop fittings. Laidlaw v. Taylor, 2 Nova S. L. R., 155 (1881).]

[1] Doe *ex dem.* Burrell v. Davis, 15 Jur., 155 (1851).

[A provision in a ninety-five year lease that a building on the premises demised should be taken "as part and parcel of the realty and in no case to be removed therefrom," and that the lessee should keep the premises in good repair, does not require the lessee to keep and maintain the building just as it was; and an alteration making a substantially new, larger and more valuable building upon the same foundation is not a violation of the covenant. Hawes v. Favor, 161 Ill., 440, 447 (1896).]

[See Ferguson v. Paul (1885), 22 Scot. Law Rep., 809, where it was considered that a clause in a lease requiring the tenant to replace trees removed by him, did not require him to replace them immediately.]

[2] See Broom Leg. Max., 588, where the maxim, *Noscitur a sociis*, is considered.

[3] 11 Exch., 113 (1855); s. c., 1 Jur. (N. S.), 962; 24 L. J., Exch., 229. See s. c., in Court of Exchequer, 10 Exch., 496; 24 L. J., Exch., 33.

the demised premises unto C. "together with all locks, keys, bars, bolts, marble and other chimney-pieces, foot paces, slabs, and other fixtures and articles in the nature of fixtures which shall at any time during the said term be fixed or fastened to the said demised premises or be thereto belonging." The plaintiff went into possession of, completed and fitted up the messuage with things necessary for carrying on the business of a tavern-keeper and licensed victualer, and for that purpose put in and fixed thereto certain fixtures of the description known as trade and tenant's fixtures. B., the defendant, afterwards contracted with the plaintiff for an under-lease of the premises and to purchase the furniture, fixtures, etc., at a valuation. In pursuance of this agreement plaintiff executed to defendant an under-lease containing a covenant on the part of the defendant in the same words as the above covenant by the plaintiff in the original lease. The defendant then entered into possession and the fixtures having been valued, a question arose between the parties whether the plaintiff had a right or title to sell the tenant's or trade fixtures, and whether the defendant upon paying therefor would have good title thereto and be entitled during the continuance of the lease or at its expiration to remove them without being guilty of a breach of covenant or being liable to plaintiff's lessor. The defendant contended that among the articles enumerated in the covenant were some tenant's fixtures, while on the part of the plaintiff it was insisted that the enumerated articles were all landlord's fixtures by the general law not removable by the tenant; and that such words operating as a limitation upon the general words connected with them in the same clause, "other fixtures" must be taken to mean "other fixtures of a like nature," and hence that the covenant did not include tenant's or trade fixtures; and of this opinion were the court. As to the locks and keys, bolts and bars, it was conceded that the tenant could not remove them; and as to the foot-paces or *slabs there could be no question, if it ap- [*171] peared that the marble and other chimney-pieces to which they were appendages were also of the same class. The case therefore turned upon the question whether chimney-pieces might be removed by the tenant during his term. This question was fully discussed by the court and the conclusion arrived at, that the distinction as to whether removable or not is whether put up for

purposes of ornament or not. Applying this distinction to the words of the covenant, it was held, that the words "marble and other chimney-pieces," placed as they were between "locks, keys, bolts, bars," and "foot-paces and slabs," the covenant having reference to a public house, did not relate to the class of chimney-pieces removable by a tenant, but like the rest of the enumerated particulars with which they were classed, to such as were commonly called landlord's fixtures, and therefore the plaintiff was entitled to judgment for the whole sum claimed. The rule has also been applied in other cases.[1]

[1] See Sumner v. Bromilow, 34 L. J., Q. B., 130 (1865); s. c., 11 Jur. (N. S.), 481. In this case the lessees covenanted to erect salt-works on the demised land, and at the end of the term to yield up possession of the premises, and also to leave at the disposal of the lessors all the fixed materials of all kinds that should be used in or about the said intended wychhouses or salt-works, or in any way relating thereto, except the salt-pans and other movable articles made use of at all or any of the said wychhouses and salt-works. Afterwards the defendants, the representatives of the original lessees, surrendered their term and took a new lease of the premises, covenanting at the end or sooner determination of their term to yield up the premises with all erections, buildings and improvements made thereon, together, also, with the present brine-cisterns, and all doors, shutters, hurdles, roofs, and roof-supporters, coal-deposits, salt-stages, weighing-machines, coal-quays, and all flues in the refined salt stoves, and also all other fixtures and appurtenances of what nature or kind soever, which should be used in or about the said counting-house, cottages, and other buildings, wychhouses or salt-works, or in anywise relating thereto, in good repair, etc.; but as to the salt-pans and other articles made use of at all or any of the said wychhouses, pan-houses or salt-works, and belonging to the lessees, they were at liberty to remove them, making good the damage to the premises sustained thereby, subject to an option of the lessor to purchase the salt-pans and other movable articles used in or about the salt-works and premises. Defendants thereafter, on Dec. 13, 1861, underlet the premises in violation of the terms of the lease, and plaintiffs, after demand of possession on the 23d of June, 1862, on the 7th of July, 1862, brought ejectment. Defendants, between Jan. 18, 1863, and March 17, 1863, pending the suit and before judgment removed salt-pans and other trade fixtures. *Held*, that the effect of the covenant was to prevent the tenants from removing landlord's fixtures, but that tenant's and trade fixtures might be removed, and that they were entitled to a reasonable time after demand of possession for that purpose. Cockburn, C. J., in delivering his opinion referring to the words "movable articles," said: "By the words 'movable articles'" [occurring in the first lease], "I think must be intended articles which might be removed by the tenant,

notwithstanding that they had been affixed to the building, because there would have been no occasion to reserve a right to take away mere chattels.'' See, also, Dumergue v. Rumsey, 2 H. & C., 777 (1863); s. c., 12 W. R., 205; 33 L. J. Exch., 88; 10 Jur. (N. S.), 155; 9 L. T. (N. S.), 775.

In Foley v. Addenbrooke, 13 M. & W., 174 (1844); s. c., 14 L. J. (N. S.), Exch., 169, the lease contained a covenant on the part of the lessee to repair and yield up in repair the furnaces, fire-engines, iron-works, dwelling-houses and all other erections, buildings, improvements and alterations to be thereafter erected, built or set up (except the iron-work castings, railways, gins, wimseys, machines, and the movable implements and materials used in or about the said furnaces, fire-engines, iron-works, stone-pits and premises). There was also a power given to the lessors to purchase those articles upon giving a certain notice before the expiration of the lease. *Held*, that the rule as to what should be removed by the lessee was, ''that whatever was in the nature of a machine or part of a machine, as iron-work or iron castings or railways, gins, or movable implements or materials, the defendants [lessees] had a right to remove; that whatever was in the nature of building or support of buildings, although made of iron, the defendants had not a right to remove.'' Under this rule the boilers, boiler-grates, castings and iron-work of the engine and regulator, and of the spring-beams, hot-air apparatus, piping, cupola and blast-pipes working it, refineries and blast-pipes working them, puddling-furnaces and mill-furnaces, holding-down pins and bed-plates, gasometers and apparatus, were *held*, to be removable; but not hoops, bearers, and brickstaffs being iron-work, not in the nature of a machine, substituted for brick-work for greater strength, oak from forge-hammer foundation, buildings and cast-iron columns supporting a building.

[See, also, as to the rule stated in the text, Deishler v. Golbaugh, 2 Ky. Law Rep., 231 (1881); Metropolitan Concert Co. v. Sperry, 9 N. Y. St. Rep., 342, 344 (1887), aff'd 120 N. Y., 620 (1890); *Ex parte* D'Eresby (1881), 15 Co. Ct. & Bankr. Cas., 163, reversing *Ex parte* Sheen (1880), 15 Co. Ct. & Bankr. Cas., 39.]

[A provision ''that all improvements placed in said buildings by the lessees, viz., elevators, boilers, heating apparatus, etc., shall be deemed fixtures not to be removed,'' does not cover an electric lighting apparatus. The word ''improvements'' is limited by the *videlicet* clause which follows, and the ''etc.'' does not enlarge its scope. Loeser v. Liebemann, 14 N. Y. Supp., 569, 570 (1891).]

[The rule of *ejusdem generis* was held to exclude trade fixtures in Cubbins v. Ayres, 72 Tenn., 329, 333 (1880); Argles v. McMath, 26 Ont., 224, 239 (1895), aff'd 23 Ont. App., 44, 47 (1896); Lambourn v. McLellan [1903], 2 Ch., 268, reversing [1903], 1 Ch., 806.]

[A lease was made of a seam of coal, coke-ovens and improvements, and provided that any improvements made by the lessee were to remain. The lessor also sold to the lessee the mules, mine-wagons, and mine-rails, which were in the mine at the date of the lease, and these were expressly

[*172] *Effect of Contracts entered into subsequently to the Original Demise.

Agreements modifying or restraining the right of a tenant to remove fixtures, entered into subsequently to the original demise, may be by an independent contract, or by the terms of a subsequent demise, or renewal of the original lease. The right of a tenant to remove fixtures may of course be taken away by an express contract for that purpose; and contracts entered into subsequently to the original demise by a fair

excluded from the lease. Subsequently the lessee substituted a "rope haulage system" in place of mule-power. *Held*, that the haulage system could be removed by the lessee, as the word "improvements," as used in the lease, was clearly not intended to apply to appliances used in removing coal. Beech Grove Coal Co. v. Mitchell, 193 Pa. St., 112 (1899).]

[A covenant provided that "the tenant shall also leave gratis for the landlord or his incoming tenant all the roots remaining unconsumed in the ground, and also all improvements made by the tenant, and all cultivations, dressings, and manures, in consideration of no claim being made by the landlord for similar matters on the tenant now entering." *Held*, that the word "improvements" did not cover glass houses, as it is qualified by the subsequent words "similar matters" to mean tillages, etc., in respect to which the landlord made no claim. Mears v. Callender [1901], 2 Ch., 388, 397.]

See, however, Haley v. Hammersley, 3 De G. F. & J., 587 (1861); Wilson v. Whateley, 30 L. J. Chanc., 673 (1860); s. c., 7 Jur. (N. S.), 908; 3 L. T. (N. S.), 617; 1 John. & H., 436. In the case last named the lease contained a covenant by the lessee at the end of his term to yield up the premises together with the fixtures and things specified in the schedule, and also together with all doors, wainscots, shelves, presses, dressers, drawers, locks, keys, bolts, bars, bell-staples, hinges, hearths, marble and other chimney pieces, mantel-pieces and chimney-jambs, foot-paces, slabs, carvings, glazed windows, window-shutters, partitions, sinks, water-closets and cisterns, and things thereunto belonging, pumps, pipes, posts, poles and rails, water-tanks and other additions, improvements, fixtures and things which then were, and which at any time during the said term should be, in any way fixed or fastened to, or set up in, or upon the said demised premises or any part thereof, in good order and condition." With reference to this covenant, Wood, V. C., expressed the opinion as to tenant's fixtures not specified in the schedule to the lease, that the words "other additions, improvements, fixtures and things" could not be tied down to the articles *ejusdem generis* preceding, and *held*, that the lessee's title to such tenant's fixtures was as between vendor and purchaser of the term and tenant's fixtures, too doubtful to be forced upon the purchaser.

*construction thereof sometimes have that effect, al- [*173] though no mention is made therein of fixtures or other annexations.

This is well exemplified by the case of Fitzherbert v. Shaw,[1] where the purchaser of lands having brought ejectment against a tenant from year to year who was in possession at the time of his purchase, the parties entered into an agreement, among other things, that judgment should be signed for the plaintiff in ejectment with a stay of execution till the Michaelmas following, till which time the defendant was to continue in possession. In this agreement no mention was made of any buildings or fixtures. Between the time of entering into the agreement and the ensuing Michaelmas, the defendant took away several things from the premises, among which were a wooden stable, which stood on blocks or rollers, which he had before removed from an estate of his own adjoining to the premises in question, a shed which he had himself built on brick-work, and some posts and rails which he had also erected; and for this an action on the case in the nature of waste was brought. Mr. Justice Gould was of opinion at the trial that the defend- *ant would clearly have been entitled to take away said [*174] articles, if he had done it during the continuance of his term from year to year, but that by the agreement the parties had made a new contract, which put an end to the term. And the Court of Common Pleas, without going into the general question as to the right of a tenant to remove buildings, etc., held that the fair interpretation of the agreement was that as the defendant was to remain in possession for a certain time after the agreement was entered into and judgment signed in the ejectment, he should do no act in the meantime to alter the premises; but should deliver them up in the same situation as they were in when the agreement was made and the judgment signed.

The case of Heap v. Barton[2] was very similar in its facts to

[1] 1 H. Bl., 258 (1789).

[2] 12 C. B., 274 (1852); s. c., 16 Jur., 891; 21 L. J. (N. S.), C. P., 153; 10 Eng. L. & Eq., 499. In this case the contract was as follows: "In consideration of Messrs. John & George Barton not appearing to this action, I hereby undertake not to issue a writ of possession until after the 25th day of March next."

that of Fitzherbert v. Shaw, above cited, which was regarded by the court as decisive of the question. In delivering his opinion in the case Jervis, C. J., observed that "the intention evidently was, that the plaintiff should suspend his remedy for obtaining possession of the premises until the 25th of March, in consideration of the defendants, then giving them up in the same condition as they were in at the time of making that agreement. If the tenants meant to avail themselves of their continuance in possession to remove the fixtures, they should have said so." The doctrine of Fitzherbert v. Shaw has also been recognized and approved in other cases and may be regarded as well settled.[3]

It is also well settled that if a tenant having the right to remove fixtures erected by him on the demised premises, accepts a new lease of such premises without reservation or mention of any claim to such fixtures, and enters upon a new term [*175] *thereunder, the right of removal is lost, notwithstanding his actual possession has been continuous. In such a case the acceptance of a new lease of the premises, including the fixtures, without any reservation of right or mention of any claim to the fixtures and occupation under the new letting, are equivalent to a surrender of the possession to the landlord at the expiration of the first term. The tenant is in under a new tenancy, and not under the old; and the rights which existed under the former tenancy, and which were not claimed or exercised, are abandoned as effectually as if the tenant had actually removed from the premises, and after an interval of time longer or shorter had taken another lease and returned to the premises. A lease of the lands and premises carries with it the fixtures thereon, and by accepting such a lease without exception or reservation, the tenant takes a lease of the lands including the fixtures thereon, acknowledges the title of the landlord to both, and is estopped from controverting it.[4] And in such a case a

[3] See Loughran v. Ross, 45 N. Y., 792, 795 (1871); Merritt v. Judd, 14 Cal., 59, 71 (1859); Deeble v. McMullen, 8 Ir. Com. Law, 355 (1857); also the cases cited in the following notes. See, however, Dean v. Allalley, 3 Esp., 11 (1799).

[4] Loughran v. Ross, 45 N. Y., 792 (1871); Merritt v. Judd, 14 Cal., 59 (1859); Jungerman v. Bovee, 19 Cal., 354 (1861); Earl of Mansfield v. Blackburne, 6 Bing. N. C., 426 (1840); s. c., 8 Scott, 720; Abell v. Will-

iams, 3 Daly, 17 (1869). See, also, Shepard v. Spaulding, 4 Met., 416 (1842); Philipson v. Mullanphy, 1 Mo., 620 (1826); Van Rensselaer v. Penniman, 6 Wend., 569 (1831). [Marks v. Ryan, 63 Cal., 107, 111 (1883); Hedderich v. Smith, 103 Ind., 203 (1885); Sanitary Dist. of Chicago v. Cook, 169 Ill., 184, 190 (1897), aff'g 67 Ill. App., 286 (1896); Gauggel v. Ainley, 83 Ill. App., 582, 586 (1898); Smyth v. Stoddard, 105 Ill. App., 510, 518 (1903), aff'd 203 Ill., 424 (1903); Bauernschmidt Co. v. McColgan, 89 Md., 135, 139 (1899); Carlin v. Ritter, 68 Md., 478 (1888); Watriss v. First Nat. Bank, 124 Mass., 571, 576 (1878); McIver v. Estabrook, 134 Mass., 550 (1883); Champ Spring Co. v. B. Roth Tool Co., 103 Mo. App., 103 (1903); Anthony v. Rockefeller, 102 Mo. App., 326, 331 (1903); Williams v. Lane, 62 Mo. App., 66, 68 (1895); Stephens v. Ely, 162 N. Y., 79 (1900); Talbot v. Cruger, 151 N. Y., 117, 120 (1896), aff'g 88 Supr. Ct. (81 Hun.), 504, 507 (1894); Nieland v. Mahnken, 89 App. Div., 463, 464 (N. Y., 1903); Hayes v. Schultz, 68 N. Y. Supp., 340 (1900); Cook v. Scheid, 4 Weekly Cin. Law Bul., 1123 (Super., (1880); Spencer v. Commercial Co., 30 Wash., 520 (1902); Orr v. Davis, 17 N. Z., 106 (1898); Daly v. Marshall, 4 N. Z. L. R., Supr. Ct., 28, 34 (1885); see, also, Leman v. Best, 30 Ill. App., 323, 324 (1888); Unz v. Price, 22 Ky. Law Rep., 791 (1900); Bohn v. Hatch, 133 N. Y., 64, 69 (1892); Stephens v. Ely, 14 App. Div., 202, 203 (N. Y., 1897); Hertzberg v. Witte, 22 Texas Civ. App., 320, 321 (1899).]

So, where by an agreement dated Oct. 6, 1843, tenants in possession agreed to take a lease of a mill "with the steam-engine, and engine and gas-houses, outbuildings and appurtenances to the same belonging, and as the same are now respectively occupied by them, and the main shafts and going gear for working the machinery therein" for the term of twenty-one years from May, 1841, and on settling the lease after a decree for specific performance, the lessees objected to a demise purporting to be of the mill and steam-engine, etc. (in the terms above stated), on the ground that it would pass their tenant's fixtures to the landlord, and insisted on having a schedule of landlord's fixtures, and sought to exclude the gas-works, it was *held*, that if the tenants intended to treat some part as not the landlord's property, they should have introduced the exceptions into the contract, and the court refused to insert either the schedule or an exception. Sharp v. Milligan, 23 Beav., 419 (1857); s. c., under the style Thorpe v. Milligan, 5 W. R., 336.

[A lease of a vacant lot contained provisions for a renewal and an option to purchase by the lessee. The lessee without request of the lessor built a synagogue, and the lease was subsequently renewed. Upon the lessor's death his executor was unable to convey, as the lessor had only a life estate. In an action for damages for breach of the covenant to convey, *held*, that the value of the buildings could not be recovered, as they had become the property of the lessor by the renewal. Gerbert v. Trustees, 59 N. J. Law, 160, 186 (1896).]

[A trustee in bankruptcy occupies no better position than the tenant. Van Vleck v. White, 66 App. Div., 14, 17 (N. Y., 1901).]

[Where a grantee of the land has paid rent for stables thereon under the belief that a former tenant had the right to remove them, he can, upon discovering his mistake, recover the money so paid. Harper v. Gaynor, 19 Viet. L. R., 675 (1893).]

[The right of the tenant, under his lease, to a building erected by him, is not affected by a renewal of his lease where the original lease provides for such a renewal. Livingston v. Sulzer, 26 Supr. Ct. (19 Hun), 375, 381 (N. Y., 1879).]

[Where a land-owner leases the premises and, at the same time, sells to the tenant all of the fixtures thereon empowering him to remove them and agreeing "not to regard them or any of them as fixtures," a new lease taken by the tenant does not affect his right of removal, as the presumption that the annexed articles have become a part of the freehold has been overcome. O'Brien v. Mueller, 96 Md., 134 (1902).]

[An abatement or increase of rent is not a surrender of the old tenancy. Prouguey v. Gurney, 37 Up. Can. Q. B., 347, 357 (1875).]

However, in Devin v. Dougherty, 27 How. Pr., 455 (1864), where a butcher, a tenant for years, during his first term erected a wooden awning over the sidewalk in front of and adjoining the building for the purpose of keeping the sun off from his vegetable and fruit stand, and during his original term took a new lease of the premises containing no provision as to the erection already made, it was *held*, that his right of removal was not affected thereby. This case, however, seems very clearly not to be a correct exposition of the law on this subject.

[While the rule stated in the text is well established by weight of authority, the courts seek to limit its injustice in every way possible, as will be seen by some of the cases *supra*. In Bernheimer v. Adams, 70 App. Div., 114 (1902), aff'd 175 N. Y., 472 (1903), it is said: "The law does not favor forfeiture. In such cases it lays hold of slight evidence to work a waiver or estoppel." In this case the landlord claimed the fixtures on the ground that their removal would injure the freehold, and he was not afterwards allowed to invoke the rule that they became his by the taking of a new lease. It was further held that this rule must be limited to articles distinctively realty, and incapable of removal without injury to the freehold; and taking a new lease before the expiration of a former one does not necessarily conclusively presume the surrender of the former. See, also, Smusch v. Kohn, 49 N. Y. Supp., 176, 177 (1898). In Chaffee v. Fish, 2 Ohio Dec., 89 (1894), a lease of vacant land provided that the tenant might enclose same with a fence to keep in his live stock, and at the expiration of the lease the tenant might remove the fences. A second lease was taken, which contained no provision as to removal. The fence was a light affair of wire and slats which could be rolled up, and was attached to small posts driven into the ground. *Held*, that the intent of the parties was that the fence should be temporary, and that the tenant had a right to remove the same.]

[The rule that a tenant, by renewing his lease, loses his right to remove fixtures "must yield to the intention of the parties, to the lease as de-

*covenant in the new lease to surrender the premises at [*176] the end of the term in as good state and condition as reasonable

duced from the language employed, when viewed in the light of the circumstances attending the transaction.'' Where, by applying the rule, the tenant by a renewal of a lease for sixty days, would lose property worth over five thousand dollars, *held,* that it showed an intent that the tenant should retain the right to remove given by the prior lease. Wright v. Macdonnell, 88 Tex., 140, 152 (1895), reversing 27 S. W., 1024 (Tex. Civ. App., 1894).]

[While a new lease would, under ordinary circumstances, be a lease of the fixtures, still it is only a presumption that it was intended to cover fixtures, and it is open to proof. If the new lease does not cover the fixtures, there is no waiver of the right to remove them. Where the tenant owning fixtures of equal value to the realty, which he has the right to remove, treats with his landlord for a new lease, he is not supposed to treat for a lease of what he already owns; and if he accepts a lease which does not in clear terms cover the property which he owns, it ought not to be construed to cover such property. Second Nat. Bank v. O. E. Merrill Co., 69 Wis., 501 (1887).]

[A few states have repudiated the rule stated in the text. In Kerr v. Kingsbury, 39 Mich., 150 (1878), Cooley, J., in delivering the opinion of the court, says: ''Why the right should be lost when the tenant, instead of surrendering possession, takes a renewal of his lease, is not very apparent. There is certainly no reason of public policy to sustain such a doctrine; on the contrary, the reasons which saved to the tenant his right to fixtures in the first place are equally influential to save him on a renewal what was unquestionably his before. What could possibly be more absurd than a rule of law which should in effect say to the tenant who is about to obtain a renewal: 'If you will be at the expense and trouble and incur the loss of removing your erections during the term, and of afterwards bringing them back again, they shall be yours; otherwise you will be deemed to abandon them to your landlord.' * * * In our opinion it [the new lease] ought not to be held to include them unless from the lease itself an understanding to that effect is plainly inferable.'' See, also, Union Terminal Co. v. Wilmar & S. F. R'y Co., 116 Iowa, 392, 397 (1902); Wittenmeyer v. Board of Education, 10 Ohio Circ. Ct., 119 (1895); Radey v. McCurdy, 58 Atl., 558 (Pa., 1904).]

[Taking a new lease, with a provision that the tenant will deliver up said premises in as good condition ''as the same are now in,'' does not affect the right to remove an outbuilding and fences which the tenant had the right to remove under his former lease, as they were personal property, and the new lease is of real property only, and does not cover such fixtures, the occupancy being continuous. McCarthy v. Trumacher, 108 Iowa, 284 (1899).]

use and wear thereof will permit, etc.,[1] to repair and surrender in repair, etc.,[2] and other similar covenants, relate to, and in- [*177] clude *the fixtures then on the premises, unless there shall be some very special matter to take them out of the operation of the covenant. Whether any matter capable of having

[1] Loughran v. Ross, 45 N. Y., 792, 795 (1871). One lease in this case contained this covenant, and the other demise was by parol, from which, however, the court say the same agreement would be implied. See, also, Jungerman v. Bovee, 19 Cal., 354 (1861). [Van Vleck v. White, 66 App. Div., 14 (N. Y., 1901).]

[2] Thresher v. East London Water Works, 2 B. & C., 608 (1824); s. c., 4 D. & R., 62 (limekilns); Earl of Mansfield v. Blackburne, 6 Bing. N. C., 426 (1840); s. c., 8 Scott, 720. In the case last cited the plaintiff demised a parcel of land and salt springs to defendant for the purpose of establishing salt works which were to be made by the tenant under the powers given by the lease. The first lease contained a covenant on the part of the lessor after the expiration of the first lease to execute a new lease of the demised premises "and of all the works, pits, kays, buildings and engines, to be by them erected and made on the same premises;" and the original lease also contained a covenant on the part of the lessees to pay "an additional rent of 7*l.* 10*s.* for every salt-pan which during such further term should be erected, worked, etc., by said tenants for the making of white salt." The renewed lease recited the former lease, and that lessees "had erected and set up divers engines, machines, roads and other conveniences, etc., for managing and carrying on, etc., the trade or business of rock salt, etc., getters, etc.," and after this recital demised to lessees the premises as in the original lease and also "all and every the messuages, dwelling-houses, wich-houses, salt-works, erections, buildings and other matters and things since made at, in, or upon, or under the said demised premises for the use and convenience of carrying on the said demised trades." There was also a covenant to keep and maintain in good and sufficient repair all and every the buildings, kays, work and works then standing and being on the premises, and all and every such other edifices and engines as should be at any time during the term erected, set up, built or made in or upon the demised premises, and at the determination of the term to deliver up "all and every the said premises mentioned to be thereby demised, and all such buildings, kays, works, edifices and engines in good and sufficient repair and condition." The lessees intermediate the two leases erected salt-works and salt-pans which latter were composed of plates of iron and were about 26 feet long by 26 feet wide and rested by their own weight without any fastening upon low brick walls, and had iron rings on their sides by which they were lifted off for repairs. Other pans were constructed in the same manner after the renewed lease. There were metal pipes conveying the brine into the brine-pits, which were partly carried underground and partly along troughs supported by tressels.

such an effect can exist dehors the deed, seems questionable.[1] As we have already seen,[2] however, where a tenant simply holds over by consent of the landlord, either express or implied, after the determination of a lease for years, it is held to be evidence of a tenancy without any definite period for its termination, and in either case is construed to be a tenancy from year to year; and such holding will be presumed to be under and subject to the terms of the previous lease. Where, therefore, under such prior lease the tenant had the right of removing his fixtures, such right will not be lost by such holding over under such tenancy from year to year, which has appropriately been termed "an excrescence on the term."[3] But where a lease contained

The pans could not be removed without pulling down part of the gable end of the pan-houses. *Held,* that under the demise of the salt-works, etc., in the renewed lease were included the salt-pans "then erected or set up on the premises" as a necessary and constituent part of the salt-works, and that the covenant to deliver up "all and every the premises demised" was equally comprehensive and included such salt-pans. The pipes were put by the court on the same footing with the pans, and no reference was made by the court to the pans put up after the second lease, which seem, however, to have been included in the verdict for plaintiff, which was not lessened.

[In Watriss v. First Nat. Bank, 124 Mass., 571, 574 (1878), the covenant was to surrender the premises "as the same now are." See, also, Davy v. Lewis, 18 Up. Can., Q. B., 21; *Ex parte* D'Eresby (1881), 44 L. T. R., 781, reversing *Ex parte* Sheen (1881), 43 L. T. R., 638.]

[It will not be presumed that a lease which is not printed, contains covenants to surrender the premises in as good condition as received. Bernheimer v. Adams, 70 App. Div., 114, 123 (N. Y., 1902).]

[1] Thresher v. East London Water Works; Loughran v. Ross (cited *supra*): Jungerman v. Bovee, 19 Cal., 354 (1861). [See Hertzberg v. Witte, 22 Tex. Civ. App., 320, 322 (1899).]

See, however, dictum of Buller, J., in Doe v. Burt, 1 Term, 704 (1787), that "whether parcel or not of the thing demised is always matter of evidence."

[Where the landlord desires the tenant to sell machinery to some one who would rent the buildings, and proposes to try to find such a purchaser, he recognizes the right of the tenant to remove such machinery. Second Nat. Bank v. O. E. Merrill Co., 69 Wis., 501 (1887).]

[2] *Ante,* p. *143.

[3] Mackintosh v. Trotter, 3 M. & W., 184, 186 (1838), per Parke, B. [Estabrook v. Hughes, 8 Neb., 496, 500 (1879); Glass v. Coleman, 14 Wash., 635 (1896); Pronguey v. Gurney, 37 Up. Can., Q. B., 347, 357 (1875).]

Therefore, where under a lease for years a tenant, upon complying with his covenants, was to be allowed to remove a brick building erected by him upon the premises; and after the termination of the lease, he continued to occupy with the consent of the landlord, paying rent and taxes and complying with the terms of the lease, and the property was condemned for a street. *Held,* that no forfeiture having taken place under the lease at the time of condemnation, the tenant was entitled to the damages assessed for the building. Finney v. St. Louis, 39 Mo., 177 (1866).

[Where there is a holding over by mutual consent, or by consent express or implied, the right of the tenant, after the termination of the original lease, to remove the building will not be forfeited. "And in the absence of opposing evidence, the presumption goes that the tenant does so hold over." Neiswanger v. Squier, 73 Mo., 192, 198 (1880).]

[See Laidlaw v. Taylor, 2 Nova S. L. R., 155 (1881), where the right to remove trade fixtures was not lost by a parol renewal of a lease which gave such privilege.]

[Where the old lease is extended, the right of removal is not lost, as it does not create a new tenancy. Hedderich v. Smith, 103 Ind., 203, 205 (1885); Young v. Consolidated Imp. Co., 23 Utah, 586, 593 (1901); Clarke v. Howland, 85 N. Y., 204, 206 (1881). In the last case the renewal was by indorsement. And where a new lease is in effect merely a continuance of the old tenancy, the tenant does not lose his right to remove fixtures. Royce v. Latshaw, 15 Colo. App., 420, 425 (1900); Ross v. Campbell, 9 Colo. App., 38. In Baker v. McClurg, 96 Ill. App., 165 (1901), aff'd 198 Ill., 28 (1902), one of the lessees wishing to retire from the firm, the lessor wrote "canceled" upon one copy of the lease and gave it to the retiring lessee, but kept the other copy uncanceled, and the other lessee executed a new lease for the remainder of the term with the same stipulations as the other lease. *Held,* that the parties did not intend and did not make the latter lease as a new lease, but that it was a reiteration of the former, its effect being the release of one lessee from liability, and was no more than if an indorsement had been made upon the original instrument, and had no effect upon the right to remove fixtures placed upon the premises prior to the second lease.]

[A lease provided that improvements made "during the time of this lease" might be removed by the tenant. Before the expiration of his term, the tenant entered into negotiations with another party who agreed to purchase the improvements provided the landlord would consent to an extension of the lease. They visited the landlord, stated the substance of their contract, and he agreed to give an extension. A new lease was given to the purchaser, the wording of which was substantially as the first one. *Held,* that the purchaser did not lose his right to the improvements placed upon the property by the first tenant, as the original agreement was for an extension of the first term and not for a new term, and the making of a subsequent lease was the mode adopted by the landlord to carry out his agreement. Rooney v. Crary, 8 Ill. App., 329, 333 (1880).]

[Where a lease is an extension with the "same rights and privileges,"

a clause binding the landlord (who was a tenant for life) to *pay for all fruit trees and shrubs remaining on the [*178] land at its (the lease's) expiration, the land being occupied by a tenant in the business of a nurseryman, and the demise was terminated by the expiration of the landlord's estate, and the tenant continued to hold under the remainderman paying the same rent, the new tenancy thus constituted, though popularly spoken of as a continuing tenancy, was considered by the court as in fact a new contract and a new demise. In such case the question whether such stipulation contained in the former tenancy is adopted into the new, is a question of fact; and, if nothing passes between the parties but the payment and reception of rent, the new landlord is not bound by such special stipulation of the former tenancy not in fact known to him, which he is not bound to know, and which is not according to the custom of the country.[1] The rule is stated in the case cited to be that "those terms are to be assumed as existing which are according to use and custom, but not a special term in the original lease not known to the defendant and which she was not bound to know."

As in the case of a lease a renewal thereof without exception or reservation, terminates the tenant's right to remove fixtures, so is it in the case of other agreements which terminate a possession under it, as where a tenant the next day after

and the former lease gave the right to remove fixtures, the right is not lost. Wright v. Macdonell, 27 S. W., 1024, 1026 (Tex. Civ. App., 1894).]

[If a tenant holding over has an implied tenancy, and retains a right to remove fixtures, the same rule should be applied to express renewals. Kerr v. Kingsbury, 39 Mich., 150, 156 (1878).]

[Where a landlord, by refusing to permit a tenant to remove his fixtures, gives him a right of action for conversion, a subsequent extension of the lease does not interfere with the tenant's rights. Wright v. Macdonell, 88 Tex., 140, 152 (1895).]

[Where one in possession after the expiration of a lease giving him the right to remove improvements, becomes a tenant in common of the land, he does not lose his right to such improvements. Lewis v. Perry, 149 Mo., 257, 269 (1899).]

[1] Oakley v. Monck, L. R., 1 Exch., 159 (1866); s. c., 14 W. R., 406; 12 Jur. (N. S.), 213; 14 L. T. (N. S.), 20, affirming s. c., in Court of Exchequer, 34 L. J., Exch., 137; 13 W. R., 721. See, also, White v. Arndt, 1 Whart., 91 (1836); Haflick v. Stober, 11 Ohio St., 482 (1860).

the termination of his lease contracted by title-bond to purchase the premises, there being no exception or reservation in such bond.[2]

[2] Merritt v. Judd, 14 Cal., 59 (1859). [See, also, Seiberling v. Miller, 207 Ill., 443, 448 (1904); Fernandez v. Soulie, 28 La. Ann., 31, 35 (1876); but see McDonald v. Shepard, 25 Kan., 112, 116 (1881).]

[Where lessee takes a conveyance of the premises merely for security, paying rent during his entire term, and subsequently reconveying to his landlord, there was never such a unity of interest in the tenant as to merge trade fixtures in the realty. Security Loan Co. v. Williamette Mills Co., 99 Cal., 636, 641 (1893).]

[An agreement by a tenant to go out of possession of land for a sum named is not an assignment of his fixtures. Weathersdane Park Co. v. Watson, 16 Vict., 758, 761 (1890).]

OF FIXTURES AS BETWEEN TENANTS FOR LIFE OR IN TAIL AND THEIR PERSONAL REPRESENTATIVES, AND THE REMAINDERMAN OR REVERSIONER.

The adjudicated cases upon the topics to be considered in this chapter are as compared with those concerning the relation of landlord and tenant, comparatively few in number. As has already been stated,[1] the right of removing fixtures has not been so liberally extended in this relation as in the relation of landlord and tenant. But on the other hand it is more liberally allowed here than in that of executor and heir, where there is the least relaxation; and hence the cases in the latter relation where the right has been conceded to the personal representative, have been generally considered as authorities for the right of removal in this relation, and in that of landlord and tenant. The exact limits in this respect of the distinction between these different relations, seems never to have been clearly defined. The reason of the distinction, however, seems clear enough, and herein, perhaps, may be found all the practical utility there is in the rule itself. Tenants for life are usually widows as dowresses, or husbands as tenants by curtesy, or devisees under wills with remainder to children or other blood relations. The persons entitled in reversion or remainder, in such cases, are ordinarily those nearest in ties of affection and blood to the tenants of the life estate. It may well be presumed, as between such parties, that improvements put upon the property by the life tenants, are not designed for the temporary use of such tenant, but as permanent ameliorations.[2] And where no such

[1] *Ante*, p. *90.

[2] Per Cooper, Ch., in Cannon v. Hare, 1 Tenn. Ch., 22, 33 (1872). See, also, Ferard Fixt., 131, 321. [See Culleton v. Keune, 18 Ky. Law Rep., 1065, 1067 (1897).]

[Buildings and fencing put upon land by a life tenant pass to remaindermen, for the obvious reason that the former is improving his own property for his own present benefit. Merritt v. Scott, 81 N. C., 385, 387 (1879).]

[*180] *relations as above stated exist between the tenant for life and the remainderman or reversioner, the presumption arising from the nature and probable duration of the estate of the tenant for life seems much stronger that annexations to the estate are intended to be permanent accessions to the realty, than that which arises from the simple relation of landlord and tenant for years, whose interest is temporary only and not usually so long in duration as that of a tenant for life. And such being the case the rule would not naturally be so liberally applied as in the relation of landlord and tenant for years, where such presumption is not so strong and would require less to overcome it.

The subjects of this chapter may conveniently be considered further, (1) with reference to Fixtures as between the Tenants for Life or in Tail during their lives, and the Remainderman or Reversioner; (2) Trade Fixtures and Mixed Cases as between the Personal Representatives of Tenants for Life or in Tail, and Remainderman or Reversioner; (3) Ornamental or Domestic Fixtures as between the parties last named; (4) Of the Rights of Ecclesiastical Persons and their Representatives to Fixtures, etc.; and (5) When the Right of Removing Fixtures as between the Personal Representative of Tenant for Life or in Tail, and the Remainderman or Reversioner, etc., must be exercised.

I. Of Fixtures as between Tenants for Life or in Tail during their Lives, and the Remainderman or Reversioner

First. *Tenants for Life.*—Although tenants for life are entitled to reasonable estovers, yet they are prohibited from destroying those things which are not included in the temporary profits of the land; because that would tend to the permanent and lasting loss of the person entitled to the inheritance. This destruction is called waste.[3] Thus, if glass windows,

[3] 1 Cru. Dig., tit. 3, chap. 2, § 1; 1 Wash. Real Prop., *107, *et seq.*

As between the tenant for life and remainderman, the thinnings of fir trees under 20 years of age belong to the tenant for life. Pidgeley v. Rawling, 2 Colly. Ch., 275 (1845). [See *Re* Ainslie (1884), 28 Ch. D., 89, 92.]

*though put in by the tenant himself, be broken or car- [*181] ried away, it is waste. So, also, as it is said, of wainscot, benches, doors, furnaces, and the like, annexed or fixed to the house by the tenant.[4] But the removal of articles placed on the premises by the tenant, but not annexed to the freehold, is not waste.[5]

It is believed, however, that the right of a tenant for life as to the removal during his lifetime of articles annexed by him to the estate, is equally extensive with that allowed to his executor after his death by the law of fixtures. This power of removal during his lifetime is not a power incident to his estate, but is an exception to the general rule in relation thereto accruing to him by virtue of the law of fixtures.[6]

By a parity of reasoning, a tenant *pur autre vie,* should after the death of the *cestui que vie,* have all the rights of removal that would be possessed by his executor if he were a tenant for his own life simply.[7]

[The proceeds from the sale of larch trees blown down by gales of unprecedented severity, do not go to the equitable tenant for life. *Re* Harrison's Trusts (1884), 28 Ch. D., 220.]

[4] 1 Cru. Dig., tit. 3, ch. 2, § 13; Co. Lit., 53 a; 1 Wash. Real Prop., *113; Grady Fixt., 36. [Reed v. Reed, 68 Me., 568, 571 (1878).]

[Detaching and selling the running gear of a gin-house is waste. Cannon v. Barry, 59 Miss., 289, 303 (1881).]

[A brick building three stories high and resting upon stone foundations, erected by a life tenant, can not be removed by mechanics' lienors as against the remainderman. Conrad v. Starr, 50 Iowa, 470, 482 (1879).]

[Where a conveyance is made subject to certain conditions, upon a violation of which the land is to revert to the grantor, until it is shown that re-entry was made or suit instituted by the grantor before he brings an action against the grantee for the value of fixtures removed by the latter, he can not recover. Dunman v. Gulf, &c., R'y Co., 24 S. W., 701, 702 (Tex. Civ. App., 1894).]

[5] Clemence v. Steere, 1 R. I., 272 (1850).

[6] See Ferard Fixt., 141. [See *dictum* of Rigby, L. J., in *Re* DeFalbe [1901], 1 Ch., 523, 530.]

[7] Ferard Fixt., 141. [A tenant *pur autre vie* in possession after the death of the life tenant, does not lose the right to improvements which he could have removed during the existence of the life estate. Charleston & W. C. R'y Co. v. Hughes, 105 Ga., 1, 25 (1898).]

[The purchaser of a distillery from a life tenant, thinking he was acquiring the fee, replaced the old still with a new one, which he removed after discovering his error. The remainderman having made application

Where, however, a tenant for life holds without impeachment of waste, the case is otherwise. In such case his powers are much more extensive; and like those of a tenant in tail, arise merely out of his estate.[8] Although the exercise of the right of severance in such a case is not conferred by, and is independent of, the law of fixtures, the opinion has been expressed by Mr. Ferard that the interest of the tenant for life without impeachment of waste is so far different from that of a tenant in tail, that if a case were supposed where the removal of an erection put up by the tenant for life himself, would from its circumstances, amount to an act of malicious waste or destruction, he would not be allowed to take it away;[9] and upon the authorities such opinion seems well founded.[10] It seems, [*182] *however, that the rights belonging to a tenant for life from his not being impeachable for waste are personal, or a power not coupled with an interest, and hence, at least as to those articles not removable by the law of fixtures, are not subject to be exercised by his execution creditor; and these rights are in this respect to be distinguished from the right of removal derived from the law of fixtures. This distinction was pointed out by Lord Holt with reference to the taking in execution of the fixtures of a tenant for years, in Poole's Case,[11]

for a mandatory injunction to compel the restoration of the new still, it was held that he was not entitled to the new still, but was entitled to the value of the old one. McLaren v. Coombs, 16 Gr. Ch., 587 (Ont., 1869).]

[8] Ferard Fixt., 141.

[9] Ferard Fixt., 142.

[10] It is well settled that a tenant for life without impeachment of waste, may be restrained by injunction from the commission of willful and malicious waste; and he may even be compelled to repair the waste, if actually committed, where it can be done. See, generally, the following authorities: Vane v. Lord Barnard, 2 Vern., 738 (1716); s. c., 1 Eq. Ca. Abr., 399, pl. 3; Prec. Ch., 454; 1 Salk., 161; Strathmore v. Bowes, 2 Bro. Ch., 88 (1786); Marquis of Downshire v. Lady Sandys, 6 Ves., 107 (1801); Marker v. Marker, 9 Hare, 1 (1851); Lord Tamworth v. Lord Ferrars, 6 Ves., 419 (1801); Packington's Case, 3 Atk., 215 (1744); Aston v. Aston, 1 Ves. Sr., 264 (1749); O'Brien v. O'Brien, Ambl., 107 (1751); Day v. Merry, 16 Ves., 375 (1810); Pyne v. Dor, 1 Term, 56 (1785); 1 Bro. Ch., 166; 2 Atk., 383; 16 Ves., 185; 1 Wash. Real Prop., 120. [See Stevens v. Rose, 69 Mich., 259, 270 (1888).]

[11] 1 Salk., 368 (1703); s. c., Holt, 65. See, also, Ferard Fixt., 142.

where he observed that "this was not like tenant for years without impeachment of waste; in that case he allowed the sheriff could not cut down and sell, though the tenant might; and the reason is, because in that case the tenant hath only a bare power without an interest; but here the under-lessee hath an interest as well as a power, as tenant for years hath in standing corn, in which case the sheriff can cut down and sell."

Tenants in dower and by the curtesy may not commit waste;[12] and their rights as to fixtures do not seem to have been distinguished from those of ordinary tenants for life.[13] It may be suggested, however, that there may be cases where by reason of the relations of blood and affection existing between such tenants for life and those entitled in reversion, a stronger presumption may arise that improvements put upon the property by such life tenants are designed as permanent ameliorations, than in cases of life tenancy where no such relation exists.[14]

*Second. *Tenants in Tail.*—Estates tail, like estates [*183] in fee simple, have certain incidents inseparably annexed to them, among which is this: that as a tenant in tail has an estate of inheritance, he has a right to commit every kind of waste, as by felling timber, pulling down houses, opening and working mines, etc.; and he may undoubtedly, as an incident to his estate, and independently of the law of fixtures, sever and remove whatever he has annexed to the realty, irrespective of the mode or the purpose of its annexation.[15] It seems, also, that if a tenant in tail grant all his estate, the grantee is dispunishable of waste; and also if the grantee grant it over, his grantee is also dispunishable.[16] A court of chancery will not in any case whatever restrain a tenant in tail from committing waste.[17] But this power to commit waste must be exercised during the life of the tenant in tail, for at the instant of his

[12] 1 Wash. Real Prop., *107; 1 Cru. Dig., tit. 5, ch. 2, § 34; Co. Lit., 53 a.

[13] Ferard Fixt., 143.

[14] See, *ante*, p. *179.

[15] 1 Cru. Dig., tit. 2, ch. 1, §§ 31, 32.

[16] Per Clark, J., in 3 Leon., 121 (1585).

[17] 1 Cru. Dig., tit. 2, ch. 1, § 34; Cas. temp. Talb., 16; Mos., 224; Atty. General v. Duke of Marlborough, 3 Mad., 498 (1818).

death it ceases;[18] and as will be seen in a subsequent section the right of his personal representatives in relation to removing fixtures is quite limited.

The estate of a tenant in tail after possibility of issue extinct, though strictly speaking not more than an estate for life, retains some of the attributes of an estate tail, and, among other privileges, he is dispunishable for waste, because he continues in by virtue of the livery upon the estate tail; and having once had the power of committing waste he shall not be deprived of it by the act of God.[19] But such a tenant, like a tenant for life without impeachment of waste, may be restrained by injunction from the commission of wilful and malicious waste.[20] The privileges which a tenant in tail after possibility of issue extinct enjoys, arise from the privity of estate and [*184] because *the inheritance was once in him; but if he grants over his estate to another, his grantee will be bare tenant for life.[21]

This section can not be better concluded than by quoting from the valuable work of Mr. Ferard on the Law of Fixtures,[22] to which we acknowledge our obligation for much that appears in this chapter; referring to the rights of tenants for life, etc., and of their executors, he says: "From comparing the rights enjoyed by the owners of these several interests and by their personal representations, it may be seen that the privilege of removing fixtures after the determination of the particular estate, does not arise out of the principle that whatever a testator might have removed in his lifetime, his executor is entitled to remove after his death. For it has been shown that the rights of tenants in tail and tenants for life, differ both in nature and degree; whereas the rights of their executors are in all respects similar. The distinction seems to be, that in the case of tenant in tail or tenant without impeachment of waste, the testator removes articles affixed to the freehold simply by reason of a

[18] 1 Cru. Dig., tit. 2, ch. 1, § 32.

[19] 1 Cru. Dig., tit. 4, sec. 8; Ferard Fixt., 143; Bowles' Case, 11 Co., 79 (1615); Williams v. Williams, 15 Ves., 419 (1808); 2 Freem. 53. 278; Doct. & Stud. Dial., 2, ch. 1.

[20] 1 Cru. Dig., tit. 4, sec. 12, *et seq.*, and cases cited.

[21] Co. Lit., 28 a; 1 Cru. Dig., tit. 4, sec. 16; 3 Leon., 241.

[22] p. 143.

power incident to an estate in land; whereas the right of the executor is communicated to him by the law, with a view to public benefit and convenience. The analogy of the doctrine of emblements, which is frequently of use in explaining the law of fixtures, seems, in this instance, calculated to mislead. Many legal inferences of a curious nature appear to result from the comparison here suggested. Thus, in respect of the rights of the executor of a tenant in tail: it is apprehended, that if his testator leaves issue in tail, the executor will not be entitled to greater privileges as to fixtures against the heir in tail, than the executor of tenant in fee simple may be found to have against the heir in fee;[23] although the heir in tail takes *per formam doni*. Consequently, the right of the executor of a tenant in tail may vary according as it is opposed to that of the heir in tail, or to that of the remainderman and reversioner. That is to say, if there be any difference between the right of an executor against the *heir in fee simple, and [*185] the right of an executor of tenant in tail against the remainderman and reversioner, the same difference will be found between the right of the executor of tenant in tail against the issue in tail, and that of the executor of tenant in tail against the remainderman and reversioner. It would not, however, be proper to enter further into questions of this nature, since the legal authorities appear to be wholly silent upon them."

II. Of Trade Fixtures and Mixed Cases, as between the Personal Representatives of Tenant for Life or in Tail, and Remainderman or Reversioner.

The first case in which the subject here under consideration was directly considered and passed upon, seems to have been the leading case of Lawton v. Lawton,[24] decided by Lord Chancellor Hardwicke in 1743. The material question in this case was whether a fire-engine set up for the benefit of a colliery by a tenant for life, should be considered as personal estate, and go to his executor, or fixed to the freehold and go to the remainderman. The engine in question had a shed over it (erected

[23] To the same effect, see Gibb. Fixt., 13.

[24] 3 Atk., 13.

merely for the use of the engine) in which holes were left for the ends of the timbers, to make it more commodious for removal. The evidence for the plaintiff stated that such engines were capable of being carried from one place to another; but on the part of the defendant evidence was produced to show that the engine could not be removed without tearing up the soil and destroying the brick-work. Lord Hardwicke, in delivering his judgment, *inter alia*, said: "This brings on the question of the fire-engine, whether it shall be considered as personal estate, and consequently applied to the increase of assets for payment of debts. Now it does appear in evidence, that in its own nature it is a personal movable chattel, taken either in part or in gross before it is put up. But then it has been insisted that fixing it in order to make it work, is prop- [*186] *erly an annexation to the freehold. To be sure, in the old cases they go a great way upon the annexation to the freehold, and so long ago as Henry the Seventh's time, the courts of law construed even a copper and furnaces to be part of the freehold. Since that time the general ground the courts have gone upon of relaxing this strict construction of law is, that it is for the benefit of the public to encourage tenants for life to do what is advantageous to the estate during their term." After stating some instances of the relaxation of the old rule as between landlord and tenant, he proceeded as follows: "It is said, there are two maxims which are strong for the remainderman: First, that you shall not destroy the principal thing by taking away the accessary to it. This is very true in general, but does not hold in the present case, for the walls are not the principal thing, as they are only sheds to prevent any injury that might otherwise happen to it.[1]

"Secondly. It has been said that it must be deemed part of the estate, because it cannot subsist without it. Now, collieries formerly might be enjoyed before the invention of engines, and therefore this is only a question of *majus* and *minus*, whether it is more or less convenient for the colliery. There is no doubt but the case would be very clear as between landlord and ten-

[1] In another part of the opinion it is said that "it does not differ whether a shed over such an engine be made of brick or wood, for it is only intended to cover it from the weather and other inconveniences." [See Ward v. Dudley (1887), 57 L. T. R., 20.]

ant. It is true, the old rules of law have indeed been relaxed chiefly between landlord and tenant, and not so frequently between an ancestor and heir, or tenant for life and remainderman. But even in these cases it does admit the consideration of public conveniency for determining the question. I think, even between ancestor and heir, it would be very hard that such things should go in every instance to the heir.[2] One reason that weighs with me is its being a mixed case between enjoying the profits of land, and carrying on a species of trade; and considering it in this light, it comes very near the instances in brew-houses, etc., of furnaces and coppers." * * * * "This *is not the case between an ancestor and an heir, but [*187] an intermediate case, as Lord Hobart calls it, between a tenant for life and remainderman. Which way does the reason of the thing weigh most, between a tenant for life and a remainderman, and the personal representative of tenant for life, or between an ancestor and his heir, and the personal representative of the ancestor? Why, no doubt in favor of the former, and comes near the case of a common tenant, where the good of the public is the material consideration, which determines the court to construe these things personal estate; and is like the case of emblements, which shall go to the executor, and not to the heir or remainderman, it being for the benefit of the kingdom, which is interested in the produce of corn and other grain, and will not suffer them to go to the heir. It is very well known that little profit can be made of coal mines without this engine; and tenants for lives would be discouraged in erecting them if they must go from their representative to a remote remainderman, when the tenant for life might possibly die the next day after the engine is set up. These reasons of public benefit and convenience weigh greatly with me, and are a principal ingredient in my present opinion." The engine was accordingly decreed to go to the executor for the increase of assets.[3]

[2] See, however, as to this *dictum*, Fisher v. Dixon, cited *post* under the head Executor and Heir; 1 Wms. Exrs. (6th London ed.), 691.

[3] Reg. Lib. B. (1743), fol. 151. There were certain other engines fixed upon salt-works by the *father* of the tenant for life. These engines were decreed not to be the personal estate of the testator. [See Ward v. Dudley (1887), 57 L. T. R., 20, 24.]

Dudley v. Warde[4] was very similar in its facts to the case last cited. This case was a bill filed by the plaintiff as an executor of William Lord Dudley against the defendant, who was remainderman of the estate, to have four fire-engines delivered up as part of the personal estate of Earl William, who had died seized of the colliery on which they were erected. Three of the engines had been erected by Earl Edward, his father, who was tenant in tail of the estate (which came to Earl William under a settlement), and the fourth was erected by Earl William; but it did not appear whether Earl William was tenant for life or in tail of the estate. Lawton v. Lawton was [*188] *cited and followed, and the one engine erected by Earl William was decreed to the plaintiff, and the bill dismissed as to the other three. In rendering his judgment Lord Hardwicke said: "The case being between executor of tenant for life or in tail and a remainderman, is not quite so strong as between landlord and tenant, yet the same reason governs it if tenant for life erects such an engine. In the case of Lawton v. Lawton, it was determined it should go to executors, partly on reasons there mentioned, and partly on the authority of the case of a cider-mill,[5] there cited to have been so adjudged by Lord C. B. Comyns; that of Lawton v. Lawton was the case of creditors, but that makes no difference, because the question is whether part of the real or personal estate. If it is so in the case of tenant for life, query, how it would be in case of tenant in tail? Tenant in tail has but a particular estate, though somewhat higher than tenant for life. In the reason of the thing there is no material difference; the determinations have been from consideration of the benefit of trade. A colliery is not only an enjoyment of the estate, but in part carrying on a trade.[6] The reason of emblements going to the executor of a particular tenant holds here, to encourage agriculture; suppose a man of indifferent health, he would not erect such an engine at a vast expense, unless it would go to his family."

[4] 1 Ambl., 113 (1751).

[5] This case will be found referred to (*post*) under the head Executor and Heir.

[6] See Jesus College v. Bloom, 1 Ambl., 56 (1745); s. c., 3 Atk., 264; Hanson v. Gardiner, 7 Ves., 308 (1802); Jefferys v. Smith, 1 Jac. & Walk., 302 (1820). [See, *ante*, p. *103.]

The principle of these two cases has been since recognized and followed in other cases, and may be regarded as well settled.[7] *It is of course applicable also to the case of fixtures [*189] erected solely for trade purposes, and not in part as a means of enjoying the profits of land, the consideration of public policy and convenience applying to the latter case even more strongly than to the former.[8] The decided cases on the subject relate only to steam-engines; but there can be no reasonable doubt that should the question arise, the exception would be extended so as to include all utensils, machines, and other articles of a similar nature which are themselves of a chattel nature and capable of being detached without material injury to the freehold or to themselves and of being set up and used elsewhere, to which the principle of said cases is as applicable as to the case of engines. It seems that the exception extends also to

[7] See Lawton v. Salmon, 1 H. Bl., 259, note (1782); s. c., 3 Atk., 16 note, per Lord Mansfield; Penton v. Robart, 2 East, 88, 91 (1801), per Lord Kenyon; Elwes v. Maw, 3 East, 38, 54 (1802), per Lord Ellenborough; Estate of Hinds, 5 Whart., 138 (1840), where a woman having real estate married, and her husband during the coverture put up a steam-engine on a stone and brick foundation, for the purpose of carrying on the carding and spinning business, and it was *held*, that his representatives after his death were, as against the wife, entitled to remove it from the premises, or to the proceeds thereof if sold by the wife.

There were, in the cases of Lawton v. Lawton and Dudley v. Warde, other engines erected by the ancestors of the tenants, which were decreed not to be personalty. See the note to Lawton v. Lawton; and Dudley v. Warde, at the end of the case.

[An engine set on cross timbers in the ground, a gin held by cleats, a condenser nailed to the gin and to the joists, an anvil nailed to a block extending into the ground, a vise nailed to a bench nailed to the house, and a bellows supported by posts in the ground and braced by pieces nailed to the house, attached by a tenant by the courtesy for the mixed purpose of trade and agriculture, belong to the executor as against the remainderman, and can be removed within a reasonable time. Overman v. Sasser, 107 N. C., 432 (1890).]

[An executor of a tenant for life of mines is entitled to blast furnaces, steam-engines and sheds protecting them, boilers, gas-pipes, machinery, a railway, weighing-machines, all removable without material injury; but not to a shaft, nor to brick buildings used as workshops. Ward v. Dudley (1887), 57 L. T. R., 20.]

[8] See Estate of Hinds (*supra*).

trade buildings.[9] The principle above stated should however be taken with the limitation that such fixtures are not so annexed as to show a design to make them a permanent accession to the realty, in which case they would of course be irremovable.

The general grounds of the exception are stated in the case quoted from to be those of public benefit and convenience. While these may be regarded as the original grounds of the exception, as has already been intimated, the intention of the tenant for life or in tail, in making the annexation it is believed will now often have a controlling influence in determining the ques- [*190] *tion of removability; and though by reason of the relation of the parties and the duration of the estate of the tenant, the presumption that an annexation made by him was intended as a permanent accession to the realty is stronger here than in the case of landlord and tenant for years, and hence more evidence is in general required to overthrow it, yet it is believed that in other respects the observations made in a previous chapter in relation to the question of intention are in general equally applicable to this section and chapter; and the reader is accordingly referred to that chapter for the further consideration of the subject.[10]

[*191]* The cases before quoted from seem also to lay down the

[9] See White v. Arndt, 1 Whart., 91 (1835); Cannon v. Hare, 1 Tenn. Ch., 22, 34 (1872), where it is said: "It is probable, also, that the exception in favor of buildings erected for purposes of trade, will be limited in the case of tenant for life to such as are erected exclusively for purposes of trade proper, and will not be extended to occupations having an affinity or resemblance to trade. In the absence of authority, however, this can only be considered as a suggestion."

The exception does not, as it seems, extend to buildings, or other annexations for farming purposes, though there seems no good reason for any distinction. Haflick v. Stober, 11 Ohio St., 482 (1860); McCullough v. Irvine, 13 Penn. St., 438 (1850). See, also, Glidden v. Bennett, 43 N. H., 306 (1861), where fences were erected by the husband of a dowress on the dower estate. [See, *ante*, p. *110.]

[Cabins and barns, "permanent improvements put by the life-tenant upon the land," go to the remainderman as part of the estate. Brooks v. Brooks, 12 S. C., 422, 464 (1879).]

[10] *Ante*, p. *39. No reason is perceived why, except as above stated, the rules heretofore given in considering the relation of landlord and tenant are not in general equally applicable to this relation also; though in the

rule that if the removal of fixtures annexed by the tenant for life or in tail occasions substantial damage to the realty, or if they are so essential to the enjoyment of the realty, that it cannot be enjoyed without them, they cannot be removed as against the remainderman; but that where the damage caused by the removal is only to that which is accessory to the thing removed as to the engine-house in the cases cited, or to the walls in the case of coppers, etc., such damage is no ground for denying

absence of direct decisions to that effect such can not be affirmed to be the case.

With reference to this subject Mr. Ferard (page 135) says: "The practical inference to be deduced from the observations in the foregoing pages is, that in ascertaining whether a particular article set up in relation to trade, forms part of the personal estate of tenant for life or in tail, the first inquiry will be whether it is governed by the case of the fire-engines, or that of the cider-mill, decided between the executor and the heir of the deceased owner in fee. The analogy of the different cases between landlord and tenant may next be resorted to; with that caution, however, which it has been seen, is necessary on such occasions." [*i. e.*, "that although everything which belongs to the representatives of a tenant for life or in tail, on the ground of its relation to trade, may be considered *a fortiori* removable by a tenant against his landlord, a decision between these latter parties must not be relied upon as forming a conclusive ground of determination, where the claims of the former individuals are in question. Nevertheless from the analogy which prevails between the two classes, it will always be found useful in determining the rights of tenant for life or in tail, to consult any corresponding cases that have been decided between a common tenant and his landlord."] "In every instance, the general principles of trade fixtures, as they apply to each class of individuals, must be borne in mind. And lastly, regard must be paid to all those circumstances arising out of each particular case, which have been particularly alluded to in the concluding part of the first section of the preceding chapter. For from Lord Hardwicke's observations upon the subject, it will appear that besides other considerations, the question whether part of the real or the personal assets may be materially affected by the nature and construction of the article, its value to the inheritance, and the injury its removal will cause to the estate.

"It is indeed not unreasonable to expect that at the present day, a decision of the courts would carry the relaxation in favor of the personal estate further than to the removal of mere machinery, like fire-engines before Lord Hardwicke. For in the time of Lord Hardwicke, Poole's case was the only reported authority which expressly recognized the exception in respect of trade fixtures. Whereas, since that period, the general principle of the exception has been gradually extended and has been acted upon by the courts with increasing liberality."

the exercise of the right.[1] Where, also, the articles in question were not in themselves of the nature of movable chattels in gross or in part before they were put up, or are incapable of removal without substantial injury to themselves, these considerations afford strong evidence of an intention to devote them to the realty so as to render them irremovable by the representative. The question, however, in each case, is believed to be a mixed one of law and fact for which no invariable rule can be laid down, but in the solution of which the intention of the party making the annexation is a controlling factor.[2]

III. Of Ornamental and Domestic Fixtures, etc., as between the Personal Representatives of Tenant for Life or in Tail, and Remainderman or Reversioner.

With respect to the right of the executor of tenant for life, as against the remainderman or reversioner, to fixtures set up for ornament or domestic convenience, it is stated in Williams [*192] *on Executors,[3] that though "not a single case is to be found in the books relating expressly to this subject, nevertheless, upon the ground that the law is more favorable in this respect to the executor of tenant for life than to the executor of tenant in fee, it is clear, *a fortiori*, that all the cases which support the right of the latter to hangings, pier-glasses, tapestry, pictures, iron backs to chimneys, furnaces, grates, etc., are express authorities in favor of the right of the former; and further that the strong expressions of judges in favor of the heir, which in the recent cases heretofore mentioned, somewhat weaken the effect of the determinations in favor of the claims of the executor of tenant in fee, do not affect them with relation to those of tenant for life or in tail." The same views are also advanced by Mr. Ferard and other writers on the subject.[4] Since the date of the edition of Williams on Executors above quoted

[1] See, also, Ferard Fixt., 131; Grady Fixt., 47.

[2] See (ante), pp. *24, *39.

[3] 6th London ed., I., p. 701.

[4] Ferard Fixt., 137, *et seq.;* Grady Fixt., 49; Gibb. Fixt., 12. See, also (*post*), chapter on Executor and Heir.

from, the subject therein referred to has been considered to some extent by Lord Romilly in the case of D'Eyncourt v. Gregory.[5] As this is a well considered case and one of considerable importance, in the absence of other authorities on the subjects therein considered, it will be herein quoted at some length: In this case a testator, who was tenant for life of settled estates upon which he had erected, fitted up and furnished a mansion (the old one on another site having fallen into decay), demised his fee simple estates in strict settlement to the same persons to whom the settled property would pass, and gave to his trustees all the tapestry, marbles, statues, bronzes, pictures, prints and drawings, with their frames and glasses, which should be in or about the said mansion house at the time of his death and of which he had power to dispose, to be enjoyed and to go as heir-looms with the property as far as the rules of law and equity would permit, with a shifting clause providing that in case of the non-fulfillment of a speci-

[5] L. R., 3 Eq., 382 (Dec. 7, 1866); s. c., 36 L. J. (N. S.), Chanc., 107; 15 W. R., 186. See, also, Snedeker v. Warring, 12 N. Y., 170 (1854), *ante*, p. *25; Rogers v. Crow, 40 Mo., 91 (1867); Steuart v. Douglas (1870), reported in Brown Fixt., Append. A.

[In *Re* DeFalbe [1901], 1 Ch., 523, seven pieces of tapestry were held not to pass to the remainderman. They were affixed to the walls by the life tenant as follows: Small slips of wood were nailed and screwed to the original wooden casing or walls, and over these slips canvas was stretched and nailed, and the tapestries were tacked to this framework. Mouldings were fixed round the tapestries, and pillars were set up with panels between them, to fill up the space not occupied by the tapestries, and to set them off. Per Vaughan Williams, L. J.: "The quantum of fixture is important. * * You might have to employ a mode of fixing which in many cases would be conclusive of the incorporation of the chattel with the freehold. But the moment you come to the conclusion that the mode of fixing which was employed was absolutely necessary for the enjoyment of the chattel, that inference does not arise. * * I wish to say a word about D'Eyncourt v. Gregory and Norton v. Dashwood. I cannot find that either Lord Romilly, M. R., or Chitty, J., said anything which is inconsistent with the principle I have sought to imply. * * Lord Romilly inferred from all the facts of that case that the tapestries were affixed as they were to the walls for the purpose of the improvement of the freehold, and not for the purpose of their enjoyment as chattels." Per Rigby, L. J.: "There is another equally important and well established exception from the rule, in the case of articles which have been affixed to the freehold, not with the object of enhancing its value, but for the pur-

[*193] *fied condition then the demised estates and all the articles thereby made heir-looms were to go in the same manner as if the limitations in favor of the person not performing such condition had not been inserted in the will. After the testator's death A. became tenant for life of both the settled and demised estates, and on his death the settled estates devolved on B., who did not fulfill the specified condition, upon which the shifting clause took effect in favor of C.; and therefore the question arose as between B. and C., what were the articles which the testator could dispose of. The articles upon which the principal questions arose were described substantially as follows:

The portrait in oil in the great hall, on canvas and stretcher, was screwed by nails or screws to blocks or plugs of wood inserted in the brick-work; a wooden moulding was placed upon the front of the picture, one portion of such wooden moulding being next the picture and the other flush with the wainscoting of the room, such moulding being attached by screws or nails to wooden plugs in the wall; a wooden frame was placed over

pose of ornamentation. * * In all such cases the object (whatever it may be) which is affixed for the purposes of ornamentation, is affixed to the freehold, but the exception allows it to be removed. * * At any rate, I think that the decision in D'Eyncourt v. Gregory is not right if it would apply to such a case as the present. * * In taking down the tapestries some trifling damage may have been done to the walls, * * * the damage ought to be allowed or made good by the executor. I do not agree that the respondent should have consequential damages for redecorating the room." Aff'd Leigh v. Taylor [1902], A. C., 157.]

[In a contest between a trustee in bankruptcy of a deceased tenant for life, and the remainderman, it was held that a collection of stuffed birds attached by glue or wire to cases which were a part of the house, was not a part of the freehold. Hill v. Bullock [1897], 2 Ch., 483, aff'g [1897] 2 Ch., 55.]

[A "trophy" consisting of the uniform and accoutrements of King George III. in a case affixed to the wall, pass to the trustee of a deceased tenant for life as against the remainderman. Hill v. Bullock [1897], 2 Ch., 55.]

[An altar stone, not physically attached, and a case of relics placed in a cavity under the altar, all forming part of a chapel as used for religious purposes, seem to belong to the remainderman as against the personal representative of the tenant for life. Petre v. Ferrers (1891), Weekly Notes, 171.]

such moulding and attached thereto and to the wainscoting of the room by screws or nails, the heads of which were afterwards stopped and gilded with the frame. This painting and gilt frame could be easily removed without damage, and if the painting were removed and the framework filled in with figured satin in the same manner as were all the other panels in this room, it would be a counterpart of them, the moulding round the painting being exactly similar to those which were round the satin-lined panels.

The tapestries were each on wooden stretchers attached to the wall in a similar manner to that described with regard to the portrait, that being the usual method where the walls are recessed. Painted wooden mouldings were then placed round the face of such tapestries substantially in the same manner as above described with reference to the portrait, and the tapestries could be very easily removed and the mouldings replaced if required without material damage to the walls or paneling of the room. The room had enriched panels, and if the panels from which it was desired to remove the tapestries were *ornamented in the same style, it would make a per- [*194] fectly complete apartment as far as these walls were concerned.

The chimney-glass in an ornamental frame and an oil painting surmounting it were placed against the flush face of the wall and attached with nails or screws only, as an ordinary looking-glass would be fixed, and could be easily taken down.

The carved and gilt frames filled with white satin occupied the side of a room and were placed and attached in the same manner as the chimney-glass, and could easily be removed without damage.

The carved kneeling figures in the great hall were placed upon pedestals forming parts of the cedar stair-case. They were formed of cedar, and were hollow; and the figures where attached to them were hollow, and were so attached by a few screws only. The figures were evidently not designed to rest upon the particular pedestals which they then occupied, as the plynths of the figures and the tops of the pedestals did not accord in their proportions. The figures could easily be lifted off the pedestals without damage.

The sculptured marble vases in the hall had the appearance of resting upon massive cedar pedestals, but the cedar-work

was merely a casing built round the real supports or piers upon which the vases stood, which being of great weight rested upon piers probably of brick-work, the cedar casing being cut and fitted round the bases of the vases. The great weight of these vases rendered the use of mortar, cement or other material, wholly unnecessary for the purpose of attaching them to the pedestals, and they were not fixed or fastened in any manner save by a beading of cedar wood, and could be lifted off the pedestals without damage to the freehold, and the pedestals would only require new tops to render them fit to receive any other objects that might be placed on them.

The pair of lions three feet high at the head of the flight of steps in the garden were of sculptured marble, and of very great weight, and simply rested on stone pieces or pillars, and had no appearance of being attached except by their own weight, [*195] *and could easily have been lifted off without damage to the said stone piers.

The stone garden seats were marble slabs of great weight, each resting on three stone supports or uprights sunk a short distance in the earth, and retained in their proper position solely by their great weight, and could easily be lifted off without damage to them or the supports.

In delivering his judgment, Lord Romilly, M. R., referring to these articles, said: "The first of these which I think proper to mention is the tapestry which was put up by the testator, Gregory Gregory, himself. It is clear that the testator could not have disposed of paper affixed to the walls, nor, if he had used silk instead of paper for lining the walls, he could not, in my opinion, have removed the silk. So, if the testator had covered the walls of the house with paneling, he could not, in my opinion, have removed the paneling and have left the walls bare. If he caused them to be painted in fresco, he could not have removed the paintings, and I think if he had caused the panels to be painted he could not have removed the painting any more than if he had put in panels already painted, and fixed them close to the wall. In all these cases I think they must be considered to be fixtures not removable by the tenant for life. Upon considering the case of the tapestries already fixed at the death of Gregory Gregory, I have come to the conclusion that these fall within the description of such matters

as those I have just enumerated, and that they could not be removed; in other words that the testator himself could not have been allowed to remove them. [His Lordship then read * * the description of the mode in which the tapestries were fastened.] Although this is not as complete as if the tapestries were actually affixed to and inseparable from the walls themselves, which, I apprehend, is never done, still I think they must be treated as part of the wall itself, and by so placing them Mr. Gregory Gregory deprived himself of the power of removing them.

"In the same class with these tapestries is the portrait of Lady Williams. [His Lordship then read the description.] The observation that 'the painting and gilt frame may be *removed easily and without damage, and if the paint- [*196] ing were removed, and the framework were filled in with figured satin in the same manner as all the other panels in the room' is, in my opinion, very pregnant. Both the painting and the tapestries could be removed unquestionably in this sense, that they could be taken down, and the space left or filled with satin, and so likewise the satin in the frames could be taken down, and the gaps replaced by paper in the same manner as the tapestry might be replaced with satin; whereas this paper, being stuck close to the wall, could not be removed; but in my opinion, in all these cases, whether it is the paper or the satin, or the panels or the tapestry, they are all part of the wall itself, and they are fixtures not to be removed. In all these cases the question is not whether the thing itself is easily removable, but whether it is essentially a part of the building itself from which it is proposed to remove it, as in the familiar instance of the grinding-stone of a flour-mill, which is easily removable, but which is nevertheless a part of the mill itself, and goes to the heir and not to the legal personal representative.

"The chimney-glass and the ornamental frame, and the oil-painting surmounting it, appear to me to be no part of the house itself, or of the wall itself, but to be merely ornaments attached to it, which the testator might have removed.

"The carved and gilt frames filled with blue and white satin, as I understand the evidence, fall exactly in the same category as the tapestry, and are in fact, instead of what is usually

paper, a covering of the walls and form part of the walls themselves.

"With respect to the carved kneeling figures on the staircase in the great hall, and the sculptured marble vases in the hall, they appear to me to come within the category of articles that cannot be removed. I think it does not depend on whether any cement is used for fixing these articles, or whether they rest by their own weight, but upon this: whether they are strictly and properly part of the architectural design for the hall and staircase itself, and put in there as such, as distinguished from mere ornaments to be afterwards added. There [*197] *may be mansions in England on which statues may be placed in order to complete the architectural design as distinguished from mere ornament; and when they are so placed, as, for instance, they are in the cathedral of Milan, I should consider that they could not properly be removed, although they were fixed without cement or without brackets, and stand by their weight alone. In such a case they resemble the stone of a mill which is part of the mill itself and goes to the heir-at-law. I admit that the distinction between such statues as are added by way of ornament, and such as belong to an architectural design, and form part of the design itself, is extremely thin, and that in many cases it would be difficult to distinguish them, unless it were done in an arbitrary manner, so closely might one run into the other. But I am unable to suggest any other mode by which the true construction can be defined more accurately than that which I have already stated. Accordingly evidence must in every case determine whether the article falls within or without the line. In the present case I have thought the articles which I have mentioned are not removable, relying upon the evidence given and the drawings laid before me.

"The same rule will apply to the lions at the head of the flight of steps in the garden, and the sixteen stone garden seats in the garden itself. These, in my opinion, must go with the estate, and are not separable as mere loose personal chattels."

The grounds of this decision, it will be observed, are that the tapestries, the portraits fixed in a panel, and the frames filled with satin put up by the testator and which were held to be in law irremovable were, though physically capable of being easily removed, essentially a part of the building itself from

which it was proposed to remove them, and the fact that these annexations were in themselves ornamental and capable of being easily removed was deemed immaterial in determining the question.[1]

The carved figures on the staircase, the marble vases in the hall, the lions at the head of the flight of steps in the garden, *and the stone garden-seats, were also held irremovable [*198] in law (though in fact easily removable) on the ground that they were strictly and properly part of the architectural design, and were placed there as such, as distinguished from mere ornaments, and so constituted an integral part of the estate.

This case well exemplifies the doctrine already stated, that the tendency and weight of modern authority is to give a controlling influence to the intention of the party making the annexation; and it is fairly inferable from the case that had the above articles not been designed to be an integral part of and a permanent accession to the estate, but annexed merely by way of ornament, they might have been disposed of by the testator, as was allowed in the case of the chimney-glass, and the ornamental frame and painting surmounting it, though attached to the wall in the same manner as the frames filled with satin which were held to be irremovable. The case is believed to be an authority to establish the right of removal of articles annexed by the tenant for life merely by way of ornament, and which are not intended as an integral part of, or as a permanent accession to, the realty, when such removal can be effected without material injury to the realty or to the articles so annexed. Further than this the authorities at present do not warrant us in going.

On the other hand a tenant for life or his representatives is not entitled to remove buildings of a permanent character; and that permanency may be predicated of all buildings which appear either by the intention of the party erecting them, the manner of attachment to the soil or the uses to which they are put, to have been designed as additions to the freehold or to enhance its income or convenience.[2]

[1] See, also, Steuart v. Douglas (1870), Appendix A. Brown, Fixt., p. 217 (3d ed.).

[2] Per Cooper Ch., in Cannon v. Hare, 1 Tenn. Ch., 22 (1872), where it was *held*, that buildings erected on a dower estate by the dowress or

tenants claiming under her "not for the furtherance of the trade or business of the lessee, but merely with a view to the yearly value or income from the land by being leased or used for dwellings," pass on the death of the tenant for life to the remainderman. In this case the lessee of the dowress erected on a city lot a row of buildings framed in the shop, each part marked for its particular position, and raised, and finished without further framing, on a brick foundation, with brick chimneys and composition roof entire, and rented the lower rooms for stores and the upper for bedrooms. On the death of the dowress these buildings passed to the remainderman with the land. See, also, Doak v. Wiswell, 38 Me., 569 (1854); Haflick v. Stober, 11 Ohio St., 482 (1860); McCullough v. Irvine, 13 Penn. St., 438 (1850); Glidden v. Bennett, 43 N. H., 306 (1861). [See Schimpf v. Rhodewald, 62 Neb., 105, 113 (1901).]

[A lessee of a life tenant erected a large frame building upon a good, firm foundation, and connected the same with the street sewerage. *Held*, that such building could not be removed by the lessee as against the remainderman, upon the death of the life tenant terminating the lease. Jones v. Shufflin, 45 W. Va., 729 (1898).]

[Where a purchaser, by warranty deed, from a life tenant, erects buildings and other valuable improvements under the impression that he has title in fee-simple, such improvements, upon the death of the *cestui que vie*, pass with the land to the remainderman. Pickett v. Pope, 74 Ala., 122 (1883).]

[Where a life tenant agrees to purchase, at the expiration of a lease made by him, buildings erected by his lessee, the remainderman, upon the death of the life tenant, takes them without any liability to recompense. Chilvers v. Race, 196 Ill., 71, 82 (1902).]

[Buildings were erected under an agreement between the builder and a tenant by the curtesy that the builder might remove them, which he did after the death of the life tenant. *Held*, that the heir could recover the value of the buildings removed. Demby v. Parse, 53 Ark., 526 (1890).]

In Clemence v. Steere, 1 R. I., 272 (1850), it was *held*, that the removal of a crib placed by a life tenant upon a rock and not affixed to the freehold, was not waste. See, also, 6 Law Mag. (London), 95 (1831).

[Where a railroad company purchases land from a life tenant, and constructs a track thereon, upon the death of the life tenant such structures do not pass to the remainderman. Charleston R'y Co. v. Hughes, 105 Ga., 1, 25 (1898).]

[Structures erected by permission of the tenant for life which remain the property of the builder, do not pass to the remainderman. Chicago & Alton R. R. Co. v. Goodwin, 111 Ill., 273, 281 (1884).]

*IV. Of the Right of Ecclesiastical Persons and their Representatives to Fixtures.—Dilapidations. [*199]

The cases of fixtures put up by ecclesiastical persons, and the subject of dilapidations, though in some respects distinguishable from the case of annexations by tenants for life or in tail, may be conveniently considered in this connection. This subject (except in one case hereinafter cited) does not seem to have been at all considered by the courts in the United States; and under the prevailing policy adopted in relation thereto it can never be a subject of any practical importance in this country. But, as this work might be deemed incomplete were the subject entirely passed over, the author cannot, perhaps, do better than to present in this connection the observations of Mr. Ferard[1] on the subject, with such remarks in relation thereto as seem warranted by cases since decided in England: "The claims arising between these persons and their successors in respect of annexations made by them to the freehold, seem very nearly to resemble those which have been the subject of the preceding sections.[2] And, accordingly, Bishop Gibson in his Codex,[3] in treating of dilapidations, refers to the cases of Beck v. Rebow, Cave v. Cave, and Herlakenden's Case, which have frequently been cited in this treatise.[4] And he says that, 'he sets them down as parallel to the disputes which sometimes happen between succeeding incumbents and executors of their predecessors, as to what may or may not be *taken away, and how far the taking of them away [*200] shall be accounted dilapidation.'

"The questions generally in dispute between ecclesiastical persons, relate to matters of ornament or convenience erected in the parsonage-house, etc., by the resident incumbent. And with respect to things of this description, it is laid down by the author of the Ecclesiastical Law,[5] that 'if an incumbent enter upon a parsonage-house, in which there are hangings,

1 Ferard Fixt., 145, *et seq.*

2 Relating to tenants for life and in tail and their representatives.

3 Gibson's Cod. Jur. Eccl., p. 752.

4 See *post*, Heir and Executor.

5 4 Burn's Eccl. Law (9th Lond. Ed.), 413.

grates, iron backs to chimneys, and such like, not put there by the last incumbent, but which have gone from successor to successor, the executor of the last incumbent shall not have them, but it seemeth they shall continue in the nature of heir-looms; but if the last incumbent fixed them there only for his own convenience, it seemeth they shall be deemed as furniture, or household goods, and shall go to his executor.'[6]

"It may, therefore, it is conceived, be laid down that an incumbent or his executor will in general be entitled to fixtures of the same description as those which form part of the personal estate of a deceased tenant for life, and which have been described in the second section of this chapter."[7]

The principle last above stated was questioned in an article upon the subject in volume VI. of the (London) Law Magazine for 1831, on pages 98 *et seq.*, where the opinion was expressed that the duty of an incumbent to maintain, repair and restore his parsonage, extended not only to the main walls and timbers, but to all fixtures for domestic use and convenience, which contribute to render it a suitable residence for the incumbent; and that, although he were to annex fixtures *de novo*, which had no place before, yet, if they were for convenience and domestic use, and suitable to the parsonage, it was questionable whether a court would allow them to be removed.[8] There [*201] *seems, however, to be no question (and it is so stated in said article), but that an incumbent may remove fixtures serving for mere ornament or luxury, for he is "not bound to supply or maintain anything in the nature of ornament."[9] And there seems to be no good reason for any such distinction as is suggested in the article referred to with reference to articles of convenience and domestic use; nor has any authority been dis-

[6] It seems that window-blinds and a stove put into a parsonage by the incumbent who was seized thereof in fee in right of the parish, are not necessarily a part of the freehold, and may be removed by the incumbent on the termination of his pastoral relation. Greene v. Malden, 10 Pick., 500, 504 (1830).

[7] Part I., chap. 3.

[8] See Gibb. Fixt., 13; Grady Fixt., 178.

See, however, Greene v. Malden (*supra*).

[9] See Gibb. Fixt., 13; Wise v. Metcalfe, 10 B. & C., 299 (1829), cited (*post*).

covered in opposition to the statement above quoted from the work of Mr. Ferard, and supporting the distinction above stated.

But the ornaments of the chapel of a preceding bishop being considered as in a manner fixed to the realty and in the nature of heir-looms, belong to the succeeding bishop, and are merely in succession; although other chattels in the case of a sole corporation belong to the executors of the deceased party.[10]

The rule allowing an incumbent or his personal representatives to remove fixtures erected for purposes of ornament or luxury merely, has also been extended to allow the removal of hot-houses, pineries, conservatories, and similar buildings erected for said purposes, where they are capable of being removed without injury to the freehold.

In the case of Martin v. Roe,[11] the subject was quite extensively considered. In this case an incumbent erected in the garden of the rectory apart from the rectory house, two hot-houses respectively about twenty-three and forty-seven feet in length by fifteen and seventeen in width, consisting of a frame and glass-work about ten feet high (the glass-work sliding up and down by pullies), resting on brick walls about two feet high and bedded in mortar thereon. After the death of the incumbent his executors claimed the frame-work and glass-work and removed it from the mortar in which it was bedded on the brick wall, doing no damage except what was necessa-*rily done to the mortar in the removal. The defendant [*202] took the same out of their possession, claiming that it belonged to him as rector; and it was held that the incumbent or his executors might remove such annexations within a reasonable time after his death without incurring liability for either waste or dilapidation. In delivering the opinion of the court, Lord Campbell, C. J., after quoting approvingly the rule last above quoted from the work of Mr. Ferard, said: "It may be worth observing that there is this distinction between an incumbent and an ordinary tenant for life: that the former has at no time any reversioner with any present interests or rights, whereas,

[10] Bishop of Carlisle's Case, 21 Edw. 3, 48 b (1346), cited in Corven's Case, 12 Co., 105. See, also, Fulwood's Case, 4 Co., 65 a (1591). [See Petre v. Ferrers (1891), Weekly Notes, 171.]

[11] 7 Ell. & Bl., 237, 247 (1857); s. c., 3 Jur. (N. S.), 465; 26 L. J., Q. B., 129; 40 Eng. L. & Eq., 68. See, also, 6 Law Mag., 102.

when the latter annexes anything to the freehold or in any way meddles with it, he annexes to or meddles with that in which some other person or persons has or have at the moment an existing interest which may be increased or decreased in value by what he does, and which the law will protect.[12] But neither the patron of the benefice nor the future unknown successor has any such interest in the parsonage or glebe; if any one can interfere it is the ordinary; and he not in respect of any interest vested in him, but to advance the general public object of endowments to the clergy. This seems a reason for enlarging the rule as between the executor and successor, where the subject-matter in dispute is not of a kind that can be considered as inalienably attached to the benefice, as in such case there would be no ground even for the interference of the ordinary. Suppose the case of an observatory, which an incumbent having built should take down again; it would be absurd to talk of the ordinary interfering to prevent him. When, however, the cases between the executor of tenant for life and remainderman are looked into, they will be found to turn each on its peculiar circumstances; the character, the use, the mode of attachment, the facility of severance, the injury to the freehold by severance. In regard to an ecclesiastical benefice, the character and object of the building to which the chattel is attached, and for which it has been so attached, seem of very [*203] *great consequence in determining whether there was any intention to separate it permanently and irrevocably from the personal estate. Here then is an erection, in itself purely matter of luxury and ornament, which the testator might have pulled down, but which he probably wished to enjoy so long as he lived in the benefice, and therefore did not remove. To this, and for the purpose of completing that luxurious and ornamental creation, a chattel is so attached that it may be detached without injury to the freehold. We think the inference is that it never ceased to be a chattel during the testator's life, that it continued to be so at the moment of his death, and therefore passed as part of the personal estate to the executors. Had this chattel been merely screwed, or had it been, as a tel-

[12] The fee simple is said to be in abeyance, and the incumbent in truth to be but a tenant for life, in Huntley v. Russell, 13 Q. B., 572, 588 (1849); s. c., 13 Jur., 837; 18 L. J., Q. B., 239.

escope in an observatory, strongly secured, as such instruments commonly are, to what is part of the building itself, we think no question would have been made. And this seems to us to present no substantial difference in principle." In the foregoing remarks the court were considering the subject with reference to the law of fixtures. The subject of dilapidation was also considerably discussed in said case, and the case will be found again referred to below in that connection.

Buildings erected by an incumbent for purposes other than ornament or luxury, where they are not fixed to the freehold, are held to be removable without incurring liability for waste or dilapidation.[13]

It is said, however, that the incumbent of a benefice, or his executor, can have no right to trade fixtures, because it would be unlawful for him to set them up.[14]

With reference to the subject of *dilapidation* we quote from the work of Mr. Ferard,[15] as follows: "Dilapidation is a *kind of ecclesiastical waste, and is thus defined by [*204] Degge in the Parson's Counselor, p. 134: 'A dilapidation is the pulling down or destroying in any manner any of the houses or buildings belonging to a spiritual living, or the chancel; or suffering them to run into ruin or decay; or wasting and destroying the woods of the church, or committing or suffering any willful waste in or upon the inheritance of the church.' The species of waste that constitutes dilapidation is such as is committed to the rectory-house, barns, out-buildings, etc., belonging thereto, and to the woods, hedges and fences of the same;[16] as also to the chancel of the church. These the incumbent for the time being is bound to keep in good and substantial repair. But it is confined to these things, and to fix-

[13] Huntley v. Russell, 13 Q. B., 572 (1849); s. c., 13 Jur., 837; 18 L. J. (N. S.), Q. B., 239. The buildings in this case were a lean-to, a cottage, and barn, of the kind known in that part of the country as "tenant-right" buildings; and were not fixed to the freehold, but rested on the ground or rock, or on bay stones. One of them (as appears by a note) stood partly upon posts which had sunk not quite a foot into the ground, the intention of the party in using posts being merely to prop up the building and not to let them into the ground.

[14] Gibb. Fixt., 13.

[15] p. *147, *et seq.*

[16] 4 M. & S., 188; 2 Ad. & El., 773.

tures and other annexations which became part and parcel of the freehold; and, therefore, a neglect to cultivate the glebe land in a husband-like manner does not amount to dilapidation."[17]

The subject of dilapidation was also considerably discussed in Martin v. Roe, the facts of which have already been stated in this section; and as this is a case of considerable importance in this connection, we quote from the opinion of the court, which was delivered by Campbell, C. J., so much as pertains to this subject: "We have found no decision nor authority of any text-book precisely governing this case; and we consider it therefore on principle.

"In the first place, it seems clear that had the testator in his lifetime done what the plaintiffs have done since his death, the defendant could not have sued them for dilapidations. The character of the building would have justified the incumbent in the removal of the whole of it, only he must have restored the garden to its former condition if in the removal he had occasioned any injury to it amounting to waste. For the duty of a present and the right of a succeeding incumbent, as such, are correlative. Any matter of needless expense, or luxury, or ornament, in which the present incumbent, to gratify his own taste, has indulged himself (blamably or not is im- [*205] *material), he is not only not bound, but he ought not, to transmit to his successor. If the successor may recover damages from the executor because such things have been removed by their testator, there can be no doubt he, in his turn, must maintain them; and what he must maintain he must also restore and rebuild when decayed by his fault; and so the benefice will become permanently saddled with a useless burthen, and an indefinite, it may be ruinous expense. Hot-houses, pineries, and conservatories do not in this respect differ from observatories, menageries or aviaries; they are equally what in a provincial constitution of 1236, 21 H. 3, cited in Wise v. Metcalfe, 10 B. & C., 314,[18] are called *impensoe voluptuosoe,* as distinguished from *necessariae.* The parsonage and the glebe

[17] Bird v. Relph, 4 B. & Ad., 826 (1833).

[18] The words appear to be taken from Lyndwood's Commentary on the Constitution, *Provinciale,* lib. III., tit. 27, p. 250 (ed. 1679), not. s.

are for the decent and suitable residence and sustenance of the incumbent, and are to be maintained, according to the intention of the law, out of the revenues of the benefice. This parsonage and glebe the succeeding incumbent is entitled to receive from his predecessor; the former of such convenience and character as he found it, and in good condition, properly repaired, or even rebuilt, if by his neglect that has become necessary; the latter in good repair and order, with its buildings and fences. Whatever he is so entitled to receive he must transmit; and the extent to which, in any particular case, this reciprocal right and duty will go, must be determined by a liberal and sensible consideration of the circumstances. It is impossible, from the nature of the thing, to lay down a more precise rule. Therefore cases may occur which are near the dividing line, and so present a practical difficulty. But what we have now to deal with, namely, hot-houses nearly seventy feet in length, present none. The testator did an unnecessary, probably a very unwise and unsuitable act, in erecting them; and, when he had done so, there was a *locus poenitentiae*. Nothing prevented him from removing at once all that was mere fixture; and this is all that we need decide now; though, as we have already intimated our opinion, we should have no difficulty in deciding, if *necessary, that he might have removed the whole erec- [*206] tion."[19] The principle upon which compensation for dilapidations is to be estimated was stated in Wise v. Metcalfe[20] to be that "the incumbent was bound to maintain the parsonage, and also the chancel, and to keep them in good substantial repair, restoring and rebuilding, when necessary, according to the original form, without addition or modern improvement; and that he was not bound to supply or maintain anything in the nature of ornament, to which painting (unless necessary to preserve exposed timbers from decay) and white-washing and papering belong."

[19] The learned judge remarks, in concluding this branch of the case, that it is only with reference to the strict law of dilapidations that the above remarks must be considered as made. The subject of fixtures as discussed in said case, has already been presented (*ante*) in this section.

[20] 10 B. & C., 299 (1829).

See, however, *dictum* of Erle, J., in Huntley v. Russell, 13 Q. B., 572, 585 (1849).

"The remedy for dilapidation is in its nature similar to that provided against the owners of particular estates. For bishops, rectors, parsons, vicars and other ecclesiastical persons, are considered in questions respecting the waste of lands which they hold *jure ecclesiae*, as tenants for life.[21] An action lies at the common law for dilapidation, upon the custom of the realm;[22] though the right to sue in the temporal courts was not settled till the case of Jones v. Hill (3 Lev., 268; s. c., Carth., 224 [1690]). It lies also in the spiritual courts by the canon law,[23] and remedies have moreover been provided by particular statutes, 13 Eliz., c. 10; 14 Eliz., c. 11; 17 Geo. III., c. 53; 57 Geo. III., c. 99.[24] The action may be brought by the successor against the predecessor if living, or if dead, then against his executor, etc. The action against the executor of the tort feasor was in this respect an anomaly, and an exception to [*207] *the general rule that *actio personalis moritur cum persona*. But if the successor have not the legal estate in the parsonage-house, lands, etc., he cannot bring an action for dilapidations.[25] If, however, the successor, being entitled to the legal estate, is put into possession of a part of the glebe, it is equivalent to an induction into the whole.[26] Upon an exchange of livings by agreement after mutual institution and induction, one incumbent may sue the other for dilapidation; and this although neither party at the time may have contemplated any such claim. For they have the same rights as in a common case of presentation; and it cannot be implied in such an agreement that either party was not to be liable for dilapidations.[27]

[21] Ferard Fixt., 148, citing 2 Roll. Ab., 813; Roll. Rep., 86; Amb., 176; 2 Atk., 217. See (*ante*) pp. *199, *200 in this section.

[22] Lil. Ent., 21, 67, 68; 2 Term, 630; 3 Bl. Com., 91.

[23] Respecting the proceedings in the ecclesiastical court, see Gibson's Codex, 751, *et seq.;* 1499, *et seq.;* and 3 Bl. Com., 91.

[24] It is said also to be good cause of deprivation, if an ecclesiastical person dilapidates the patrimony of the church. 3 Bl. Com., 91; Degge, part 1, ch. 8, p. 92; Wood's Case, cited 12 Mod., 237; 3 Inst., 204; Godbolt, 259.

[25] Wright v. Smythies, 10 East, 409 (1809); Browne v. Ramsden, 8 Taunt., 559 (1818); s. c., 2 B. Moore, 612.

[26] Bulwer v. Bulwer, 2 B. & Ald., 470 (1819).

[27] Downes v. Craig, 9 M. & W., 166 (1841). And see this case as to the validity of an agreement to waive a claim for dilapidations under such circumstances.

A prebendary or his personal representative, is liable to the successor for the waste of a prebendal house.[28] So, also, a sequestrator may be sued for dilapidations.[29] An action for dilapidations lies by the succeeding vicar against his predecessor, who by taking a benefice, has lost his vicarage.[30] But it has been held, that a curate appointed by the impropriator, and licensed by the archbishop, but not instituted or inducted, is not liable to be sued for dilapidations."[31]

*V. Within what Time the Right of Removing [*208] Fixtures as between the Personal Representatives of Tenant for Life or in Tail and the Remainderman or Reversioner, etc., must be Exercised.

There do not seem to be any adjudications bearing directly upon this subject. As has been already stated in a prior chapter,[32] the general rule that the right of removal of fixtures must be exercised before the expiration of the tenancy, is necessarily subject to exception in those cases where the tenancy is of uncertain duration and liable to be determined by the happening of some contingent or uncertain event on which it depends, as in the case of a tenancy at will. And in analogy to the case of a tenancy at will, it seems that, to say the least, the right of the personal representatives of a deceased tenant

[28] Radcliffe v. D'Oyly, 2 Term, 630 (1788).

[29] Hubbard v. Beckford, 1 Hag. Consist., 307 (1798); Whinfield v. Watkins, 2 Phillim., 1 (1812).

[30] Vin. Abr., Dilapidations.

[31] Pawly v. Wiseman, 3 Keb., 614 (1687). For further information Mr. Ferard refers to Vin. Abr. Dilapidations, with Serg. Hill's notes in Lincoln's Inn Library; Stillingfleet's Eccl. Cases, part 1, p. 60, *et seq.;* Degge's Parson's Counsellor, by Ellis, p. 134, *et seq.;* Godolphin Rep., 173, *et seq.;* Watson's Complete Incumbent, p. 399; Gibson's Codex, 751, *et seq.;* Burns' Eccl. Law, Dilapidations; Woodeson's Vin. Lect., Vol. III., 205; Cripp's Treatise, 276, *et seq.;* Bird v. Relph, 2 Ad. & El., 773 (1835). And see Stat. 13 Eliz., ch. 10; 14 Eliz., ch. 11; 17 Geo. 3, ch. 53; 57 Geo. 3, ch. 99; 1 & 2 Vict., ch. 106, sec. 41. See, also, as to proceedings for waste, by action, and by prohibition and injunction, in the second part of this [Mr. Ferard's] work; also Roll. Rep., 335; 11 Rep., 49 a.

[32] *Ante,* p. *147.

for life or in tail to remove the fixtures to which they are entitled, is not terminated until after the expiration of a reasonable time after the death of the person whom they represent.[33] Whether the right of removal shall be considered to extend further than this, the authorities do not declare.

With reference also to the analogous case of erections made by the incumbent of an ecclesiastical benefice, which he is entitled to remove, they may be removed by his executors within a reasonable time after his death.[34] If, however, he voluntarily determines his own interest, as by a resignation, or by accepting a benefice, he cannot, it seems, afterwards remove anything affixed to the freehold.[35] Such has been held to be the case with reference to the emblements where a parson resigns his living.[36]

[33] See *ante*, p. *147, and cases there cited; Gibb. Fixt., 12, 13; Ferard Fixt., 136, note (citing 22 Edw. IV., 27, and Cro. Jac., 204); Martin v. Roe, 7 Ell. & Bl., 237 (1857); 1 Wms. Exrs. (6th London ed.), 705.

[34] Martin v. Roe (*supra*); Grady Fixt., 178.

[35] Ferard Fixt., 146; Grady Fixt., 178.

[36] Bulwer v. Bulwer, 2 B. & Ald., 470 (1819); see, also, Betham v. Gregg, 10 Bing., 352 (1833).

CHAPTER VI. [*209]

OF FIXTURES AS BETWEEN HEIR AND EXECUTOR.

The authorities all agree in stating that the rule *quicquid plantatur solo, solo cedit,* is applied with more rigor in favor of the inheritance as between executor and heir, than in the relations of landlord and tenant, and tenant for life or in tail and remainderman or reversioner.[1] The reason of this stricter application of the ancient rule of law may be found in a variety of circumstances. In addition to the known regard of the law for the interests of the heir, it may be stated that there exist here no such grounds of public policy for making an exception to the old rule of law as in the relations above mentioned. There being no community of interest respecting fixtures between landlord and tenant, the tenant would rarely erect valuable improvements for trade purposes, if he were not allowed to remove them at the termination of his estate. In the case of tenant for life or in tail, as we have seen in the preceding chapter, the interest of the tenant being usually more intimately connected with that of the remainderman or reversioner, and his estate being more lasting, there arises a stronger presumption that annexations are intended as permanent ameliorations of the estate. And in the case of tenant in fee, the question is merely one of real or personal assets; and, especially in this country where in cases of intestacy as a general rule real and personal property ultimately vest in the same persons, whether the property after the death of the owner passes to his real or his personal representatives is a consideration which ordinarily would have no influence whatever upon *him in making annexations to the realty. Moreover [*210] in the case of a tenant in fee there arises from the nature of his

[1] See, generally, the authorities cited in this chapter and the chapters treating the subjects above mentioned; also, Kinsell v. Billings, 35 Iowa, 154 (1872); 2 Kent Com., 345. [See Norton v. Dashwood [1896], 2 Ch., 497, 500. For the rule as to vegetable products, see, *post,* *246.]

interest a presumption, very much stronger than in any of the other relations above referred to, that such annexations were intended as permanent accessions to the realty; and where such intention exists, it has, as has been already stated in a preceding chapter, a controlling influence in determining the question whether the article has become a part of the realty.[1]

With regard to the requisite degree of annexation by the owner of the soil to convert a chattel into a fixture possessing the attributes of realty, and whether actual annexation is in all cases necessary, what has been said in a previous chapter with regard to the subject of annexation real and constructive, is believed to be equally applicable in this.[2]

In determining questions arising between the heir and the personal representatives of the tenant in fee, as to whether articles annexed to the realty by the owner of the soil go with the land to the heir or to the executor as a part of the personal estate, though there are some authorities to the contrary, the rule is believed to be that in all cases, without exception, where an article of a chattel nature has been so annexed to the realty by the owner both of such chattel and the realty as to have lost its chattel nature and to have become to any extent possessed of the attributes of the realty, it passes as *res acces-*
[*211] **soria* with the realty, which is the *res principalis,* to the

[1] See (*ante*) pp. *22, *39, *et seq.*

[2] See (*ante*) pp. *8, *33, *et seq.;* also *post,* chapter 9. [Dowall v. Miln (1874), 1 Sess. Cas., 4th Ser., 1180.]

The degree of annexation may be so slight as, taken in connection with the purpose for which it was made, to show there was no intention to make the article annexed an accession to the realty, even though such annexation is made by the owner of the freehold; and in such case the article will remain a chattel. Thus a heater placed in a vat in a tannery, the vat being detached from the building except that a small piece of board was tacked with nails to the vat and the side of the building, such fastening being unnecessary and of no use except to keep the side standing while the vat was put together, is not, it seems, so annexed to the freehold as to make it a fixture, even if annexed by the owner of the freehold. Raymond v. White, 7 Cow., 319 (1827).

In Crenshaw v. Crenshaw, 2 Hen. & Mun., 22 (1808), it was *held,* that a common still not fixed to the freehold, in a house which would not be injured by its removal, was personalty, and went to the executor and not to the heir.

heir.[3] The so-called exceptions of fixtures which are held to pass to the executor, are believed not to be fixtures in any true sense of the word, but mere chattels which pass to the executor by virtue of their nature as such, and not as being exceptions to the general rule in relation to articles which are parcel of the realty.[4] It seems clear that in determining the question above stated, it is immaterial that the articles fixed are of such a nature as, if fixed by a tenant, would be removable by him during his term.[5] Nor is it necessary in order to make annexations by the owner of real estate a parcel of the realty, that he be owner of the realty by an indefeasible title.[6] It is be-

[3] Where, however, the *res principalis* passes to the executor, as personalty, the *res accessoria* passes with it, as in the case of the tenant's interest in a leasehold house which passes with the fixtures to the executor. See Brown Fixt., §§ 26, 208; Off. Ex. (14th ed.), 153.

[In Scotland a lease descends to the heir, and the question arose whether mining machinery removable as between the lessor and lessee, passed to the heir or to the executor of the lessee. *Held*, that fixtures passed to the heir. Bain v. Brand (1876), 1 App. Cas., 762, reversing (1874) 2 Sess. Cas., 4th Ser., 258, 267, and followed in (1878) 5 Sess. Cas., 4th Ser., 607.]

The water-wheel and gearing of a mill attached thereto and necessary to its operation, the wheel movable and being on gudgeons, and having a head-stock not fixed, the ends of the shafts of the wheel resting on permanent fixtures in the building, and the wheel being incapable of being taken out without removing a part of the building and being separated into pieces, are fixtures and real estate such as would have passed to the heir by descent and to which the right of dower attaches. Powell v. Munson Man'f'g Co., 3 Mason C. C., 459 (1824).

[A pier erected for the use of a wharf attached to the fee of a street is real property in which the widow is entitled to dower. Bedlow v. Stillwell, 158 N. Y., 292 (1899), aff'g 98 Supr. Ct. (91 Hun), 384, 385 (1895).]

[Compensation allowed for a house and fences placed upon the land of another by one since deceased, belongs to the heirs and not to the administrator. Worth v. Worth, 84 Ill., 442, 445 (1877).]

[4] There are some cases (referred to *post*) where articles which might properly be considered to be fixtures have been held to pass to the executor instead of to the heir. These cases, however, are believed to be incorrect statements of the law.

[5] See *Ex parte* Reynal, 2 M. D. & DeG., 443, 461 (1841).

[6] Christian v. Dripps, 28 Penn. St., 271 (1857). See, also, Kinsell v. Billings, 35 Iowa, 154 (1872), where the structure (a mill) was built by one claiming to be the owner of the land.

lieved also that where a tenant in tail leaves issue in tail, his executor will not be entitled to greater privileges as to fixtures against the heir in tail, than the executor of a tenant in fee simple against the heir in fee.[7]

Although, as above stated, fixtures as distinguished from mere chattels, as between executor and heir descend with the land to the heir, and do not pass to the executor as personalty, this view, as will be shown hereafter, has not always been adopted by the courts. The early authorities, however, seem [*212] *to lay down the rule without exception; and this without reference to whether the erections were made for the purpose of trade or otherwise.

In the Year Book, 20 H. 7, 13 b, pl. 24 (1504), the action was trespass brought by the heir against the executor for the removal of a furnace which was fixed and annexed to the frank-tenement with mortar, and the court held the removal to be tortious: "For those things which can neither be forfeited by outlawry in personal actions, nor attached in assize, nor distrained by the lord for the rent, such things the executors shall not have; but a furnace, or a table fixed in the earth with posts, or a paling, or a covering of a bed, or a wainscot or border fixed to the frank-tenement, or doors and windows and other like things which are annexed to the frank-tenement and are made *pur un profit del' enheritance,* can neither be forfeited by outlawry nor taken in distress, therefore *ex consequente* it follows that the executors shall not have such things, etc." [8]

In 21 H. 7, 26 b (1506), which is probably another report of the same case,[9] a man seized of a house in fee simple, made a furnace of lead in the middle of the house, which was not fixed to the walls of the house, and having appointed his executors, died. The heir entered, and the executors took the furnace, whereupon the heir brought trespass; and it was held by the entire court that the action lay, because the furnace was fixed to the frank-tenement; "for as well is the land the frank-tene-

[7] See the preceding chapter, p. *184.

[8] See, also, the case next cited.

[9] See Powell v. Monson Man'g Co., 3 Mason C. C., 465 (1824), per Story, J.

ment as the house; and therefore it shall go with the frank-tenement."[10] Pollard, J., in this case observed that "such things as are affixed and annexed to the frank-tenement, will descend to the heir with the inheritance; and moreover they will pass by feoffment with the frank-tenement; as where vats are fixed in the earth, either in a brew-house or in a dye-house, they are appurtenances to the frank-tenement and are altered from the *nature of a chattel."[11] In the same case Kings- [*213] mil, J., observed that "after it is fixed to the frank-tenement, it is incident to, if it is not parcel of, the frank-tenement; and it will always go and pass with the frank-tenement." * * * "And where a person fixes vats in a brew-house or a dye-house, and dies, the heir shall have them [the vats]: for when they are fixed, they are for the continual profit of the house; and on this account it is more reasonable that the heir should have them, who has the frank-tenement to which they are annexed, than that the executors should have them, who have nothing to do with the frank-tenement." Rede, C. J., also said: "The executors shall have all kinds of chattels which were their testator's; but this is where they are properly in the nature of chattels; therefore, here when this furnace is annexed and fixed to the earth, it is, as it were, a thing of a higher nature, and in a manner is made incident to this. As in the case which has been put of tables dormant, the heir shall have them after the death of the ancestor, and not the executors; and for the following reason, that when they are joined to the inheritance, it is agreeable to reason that they should pass with the inheritance until they are severed by him who has authority to sever them, and this is he in whom the inheritance is."[12] The early text-books and

[10] See, also, 11 Vin. Abr., 167; Bro. Abr. Chattels, pl. 7; id. Executors, pl. 95; id. Trespass, pl. 212; Bac. Abr. Executors, H. 3.

[11] See, also, 11 Vin. Abr., 167; Bro. Abr. Executors, pl. 95; id. Trespass, 212; Powell v. Monson Manf'g Co., 3 Mason C. C., 465 (1824), per Story, J.

[12] See, also, Keilw., 88; 8 H. 7, 12; Day v. Austin, Owen, 71 (1595); Cooke's Case, Moore, 177 (1582); 4 Co., 63 b, 64; Cro. Jac., 129; Swinb. pt. 6, sec. 7; Godolph. Orp. Leg., pt. 2, ch. 14; Shep. Touch., 469, 470; Off. Ex., 149, *et seq.;* Com. Dig. Biens, B.; Bro. Abr. Chattels, pl. 7; id. Executors, pl. 95; 4 Burns' Eccl. Law (9 Lond. ed.), 410; Bac. Abr. Executors, H. 3; 11 Vin. Abr., 167; Fost. C. L., 109. [See Carr v. Georgia R. R., 74 Ga., 73, 82 (1884).]

digests also state the rule with equal strictness, and quite generally state that rule to be that glass[13] annexed to the windows of a house, wainscot however affixed, tables dormant, coppers, leads, bayes, mangers, doors, pales, walls, staulks, cupboards, [*214] *presses, lockers, etc., affixed to the freehold, furnaces of lead and brass, vats in a brew and dye-house, whether fastened to the walls, or not fastened to a wall, but standing in or fastened to the ground in the middle of the house, mill-stones, anvils, doors, keys, window-shutters, etc., pass to the heir as parcel of the freehold, and not to the executor.[14] The rule as thus laid down and supported by numerous early authorities, has also, as we shall see hereafter, been followed and confirmed by the weight of modern authority.

As has been above stated there are, however, cases where a more liberal rule in favor of the executor and the personal estate seems to have been adopted by the courts; and this with reference, not only to fixtures put up for the purposes of trade, but also to fixtures erected for other purposes.

In Squier v. Mayer,[15] it was held that a furnace though fixed to the freehold and purchased with the house, and also hangings nailed to the walls, should go to the executor and not to the heir, contrary (as is therein stated) to Herlakenden's Case,[16] which was denied to be law as to the premises.

[13] In 21 H. 7, 26 b, above referred to, it was said, per Pollard, J., *quod non fuit negatum:* "The contrary of glass, for the executor shall have this; for the house is perfect without the glass." But this is clearly not the law. See 4 Co., 63 b, 64; Co. Lit., 53 a; Off. Ex., 151; Swinb., pt. 6, sec. 7; Shep. Touch., 469, 470; 4 Burns' Eccl. Law (9 Lond. ed.), 410. See, also, Cooke's Case, Moore, 177 (1582).

[14] See note ([12]), p. *213.

[15] Freem. Ch., 249 (1701); s. c., 2 Eq. Ca. Abr., 430.

[16] 4 Co., 64 (1589). The case referred to above as Herlakenden's Case, seems to have been Warner v. Fleetwood therein cited. The case of Squier v. Mayer is thus commented upon by Mr. Brown, in his work on Fixtures, § 209: "Of this case two possible explanations may be given, either (1) that the purchase of the house and the purchase of the furnace, although the two purchases were made at one and the same time, were essentially distinct transactions, and had been treated as such by the deceased, who had therefore by his treatment of them, both at the time of the purchase and afterwards up to the date of his death, prevented that coalescence of the fixture with the freehold which would otherwise have naturally followed; or (2) that the fixtures in question in the case were of a peculiarly

*In Harvey v. Harvey,[17] it was held that hangings, [*215] tapestry, and iron backs to chimnies belong to the executor and not to the heir; but it does not appear from the report how the articles in question were put up; nor whether they were in fact at all annexed to the realty; nor finally, whether the building to which they may have been annexed was a leasehold or held in fee simple.

The case of the cider-mill referred to by the court and counsel in Lawton v. Lawton,[18] as having been decided by Lord Chief Baron Comyns, may also be referred to in this connection. This cider-mill was said to have been let very deep into the ground, and yet upon an action of trover brought by the executor against the heir, it was held to be personal estate and to go to the executor. This case was cited approvingly by Lord Hardwicke in Lawton v. Lawton,[19] who also remarked that while it was true that the old rules of law had been relaxed chiefly between landlord and tenant, and not so frequently between an ancestor and heir at law, or tenant for life and remainderman, yet even in these cases it did admit the consideration of public convenience for determining the question, and that even between ancestor and heir it would be very hard that such things should go in every instance to the heir. With reference however to this cider-mill case, Lord Mansfield observed in Lawton v. Salmon[20] that he could not find any case except that

expensive and *unnecessary* sort, and had exhausted the personal estate in an excessive degree, so that there was a strong equity of creditors or of other persons calling for a mitigation of the rule. The case, unless explainable on one of these two suppositions, or on some other supposition, can not be considered as an authority binding in cases between heirs and executors; as neither can the case of Harvey v. Harvey," 2 Str., 1141. The case of Squier v. Mayer, as reported, contains no further statement of the facts than is herein stated, and it seems preferable to regard it (so far at least as concerns the furnace) simply as overruled. See the hangings referred to, *post*.

[17] 2 Str., 1141 (1740). See, also, 4 Burns' Eccl. Law (9th Lond. ed.), 411; Beck v. Rebow, 1 P. Wms., 94 (1706).

[18] 3 Atk., 13 (1743).

[19] Also in Dudley v. Warde, 1 Ambl., 114 (1751). See, also, Elwes v. Maw, 3 East, 38 (1802); Dean v. Allalley, 3 Esp., 11 (1799); Bull. N. P., 34; Trappes v. Harter, 2 Cr. & M., 153, 181 (1833).

[20] 1 H. Bl., 259, note (1782); s. c., 3 Atk., 16 note.

about the cider-mill (which was not printed at large) where there had been any relaxation between the heir and executor; and that that case most probably turned upon a custom. And the case itself is now doubtless overruled.[21] There are also some other authorities tending to support the more liberal doctrine [*216] above *stated, that will be found referred to in the note below and in a subsequent chapter where the relation of vendor and vendee, etc., is considered.[22]

On the other hand, besides the early cases already referred to, there are several modern cases upon the subject which seem to settle the question in accordance with the views already stated. The subject will perhaps be relieved of some of its difficulty by bearing in mind the tests of a fixture as stated in the first chapter of this work. The early cases and many more modern seem to make annexation the principal characteristic and test, though the influence upon the question of the purpose to make the articles a permanent accession to the realty seems hinted at in some of them by the use of the words "*pur un profit del' enheritance,*" and other similar expressions.[23]

A number of very respectable modern authorities lay down the rule that, as between executor and heir, the decisions seem to rest mainly on the ground that where the fixed instrument, engine, or utensil, etc., is an accessory to a matter of a personal nature (as a trade), it should be itself considered as personalty; but where an accessory to the enjoyment and use of the freehold, then it should be regarded as a fixture and go to the heir.[24] This distinction was suggested by Lord Ellen-

[21] See Fisher v. Dixon, 12 Cl. & Fin., 312, 325, 329, 331 (1845); s. c., 9 Jur., 883; Wadleigh v. Janvrin, 41 N. H., 503, 515 (1860). See, also, cases referred to in the following pages.

[22] See Ferard Fixt., 160, 188; Grady Fixt., 17, *et seq.*, 30.

[23] See the cases from the Year Books referred to at the beginning of this chapter.

[24] See Lawton v. Lawton, 3 Atk., 13 (1743), and Dudley v. Warde, 1 Ambl., 113 (1751), per Lord Hardwicke; Elwes v. Maw, 3 East, 38 (1802), per Lord Ellenborough; McKenna v. Hammond, 3 Hill (S. C.), 331 (1837); Fairis v. Walker, 1 Bail., 540 (1830); Nimmons v. Moye (1829), not reported, but cited in the two preceding cases; Heermance v. Vernoy, 6 John., 5 (1810); the case of the Olympic Theater, 2 Browne (Pa.), 275 (1813); Tuttle v. Robinson, 33 N. H., 104, 120 (1856), per Fowler, J. See, also, Teaff v. Hewitt, 1 Ohio St., 511, 535 (1853); Trappes v. Harter,

borough in Elwes v. Maw, in commenting upon the cases of Lawton v. Lawton, Dudley v. Warde, Lawton v. Salmon, and *the cider-mill case; and the latter branch of the propo- [*217] sition is unquestionably true. This latter principle was made the ground of decision in the case of Lawton v. Salmon,[25] which was an action of trover by the executor against the tenant of the heir of the testator, to recover certain vessels called salt-pans, used in salt-works. These salt-pans were placed in the works by the testator some years before his death, and were made of hammered iron riveted together; they were brought in pieces and might be removed in pieces; they were not joined to the walls, but were fixed with mortar to a brick floor with furnaces under them, and a space for workmen to go round them, and might be removed without injuring the buildings, though the salt-works would be of no value without them, while with them they were let for £8 per week. Lord Mansfield in delivering his opinion said: "I cannot find that between heir and executor there has been any relaxation of this sort" [re-

2 Cr. & M., 153, 181 (1833). In the cases of Lawton v. Lawton and Dudley v. Warde, it appears that certain other engines erected by the ancestors were considered not to be personalty.

This subject is sometimes regulated by statute. See 2 R. S. (N. Y.), 83, § 6; *post*, p. *225; Downing v. Marshall, 1 Abb. Ct. App. Dec., 525 (1863), cited *post* in chap. 9, under head Devises of Fixtures.

[Hay-scales, in an excavation made and stoned for the purpose, are part of the real estate descending to the heirs. Dudley v. Foote, 63 N. H., 57, 58 (1884); see, also, Arnold v. Crowder, 81 Ill., 56, 59 (1876).]

[Articles so affixed to the building as not to be separable without injury to themselves or to the tenement are clearly heritable. Machines only attached for the purpose of their more convenient use, and having no special adaptation to the building, are not. In regard to such articles the part which the building bears is that of shelter and support, and is truly itself an accessory to the manufacture. Articles placed in a tenement, not with a view of increasing its value, but entirely for the objects of a separate trade, never lose their character as movable property. *Held*, that beam engines and boilers built in, and a steam pump and force pump bolted to wooden or stone blocks, lathes, etc., permanently fixed, circular saws fixed upon benches, the feet of which were placed a little into the ground, but easily removable, and a hydraulic packing press built into stone foundations, go to the eldest son; but spinning machines, etc., are to be divided among the young children. Dowall v. Miln (1874), 1 Sess. Cas., 4th Ser., 1180.]

[25] 1 H. Bl., 259, note (1782); s. c., 3 Atk., 16, note.

ferring to the relaxation between landlord and tenant, etc.], "except in the case of the cider-mills, which is not printed at large.[26] The present case is very strong. The salt spring is a valuable inheritance, but no profit arises from it unless there is a salt-work; which consists of a building, etc., for the purpose of containing the pans, which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessories necessary to the enjoyment and use of the principal. The owner erected them for the benefit of the inheritance; he could never mean to give them to the executor, and put him to the expense of taking them away, without any advantage to him, who could only have the old materials, or a contribution from the heir in lieu of them. But the heir gains £8 per week by them. On the reason of the thing therefore and the intention of the testator, they must go to the heir."

So, in McKenna v. Hammond, already cited, when the intestate died a cotton-gin house and running-gear were on his premises; and his administrator supposing the running-gear to form part of the personal estate, sold it to the plaintiff. The [*218] *question in the case arose between the plaintiff, as vendee of the administrator, and the vendee of the land at a sale by a commissioner under the order of the court of equity. The gearing was annexed as follows: The post of the large wheel was let into a block morticed in the joists of the house, which block was confined by pins on each side of it, but not driven through. The floor was laid down over the block, loose, not nailed. The court upon the authority of the case of Nimmons v. Moye, decided in 1829, but not reported, held that this gearing was a fixture attached to the freehold and that the administrator had no right to sell it. In delivering the opinion of the court, Evans, J., observed that the principle upon which the case of Nimmons v. Moye was decided, was that whatsoever is erected upon land as a means of enjoying it, is a fixture; but whatever is intended for the purpose of carrying on a trade, which has no necessary connection with the use of the land, is a mere chattel and belongs to the administrator.

So, in Tuttle v. Robinson, already cited, a Franklin stove

[26] In the report in 3 Atk., it is also said that this case most probably turned upon a custom.

weighing about 300 lbs., set in the bar-room of the house of the intestate in his life time, on brick-work, without legs and with a very short funnel bricked round, it being doubtful whether it could be removed without disturbing the brick-work, was (as being accessory to the realty), held as between the heir and administrator to be a fixture and to go to the heir.[1] The same principle has also been applied in other cases and may be regarded as well settled.[2] With regard, however, to the first *branch of the proposition there is great doubt, and the [*219] better opinion is believed to be that as between executor and heir the distinction is not well founded. The origin of the notion seems to have been the *dictum* of Lord Hardwicke in Lawton v. Lawton, and that of Lord Ellenborough in Elwes v. Maw, in explaining that and the other cases referred to, *ante*. So far as regards the so-called mixed cases there seems no doubt but that the doctrine is overruled; and the principle of the cases to be hereafter referred to is believed to extend to and include other erections for trade purposes, if intended as permanent and habitual annexations, which it seems will in this relation ordinarily be presumed. It will be observed that the authorities referred to (*ante*) as supporting that distinction, are either *dicta*, or else refer to articles accessory to the realty, or are so-called mixed cases; and so far no case has been found where the point above stated has been directly raised and decided in

[1] See, also, Goddard v. Chase, 7 Mass., 432 (1811).

It seems, however, that a stove similar to the one above described, weighing about 150 lbs., standing in the dining-room on legs, and which had a short funnel passing into the chimney, but which might be removed without disturbing the brick-work, is personal property as between administrator and heir. Tuttle v. Robinson (*supra*).

[2] See Bainway v. Cobb, 99 Mass., 457 (1868); Clark v. Burnside, 15 Ill., 62 (1853), where it was *held*, that rails in stacks are personal property, but that rails in a fence are parcel of the realty and pass therewith to the heirs; and that if a guardian severs and converts them to his own use, his estate is answerable directly to the heirs for their value.

It is *held*, that manure taken from the barn-yard of a homestead and piled upon the land, though not broken up, nor rotten, nor in a fit state for incorporation with the soil, is a part of the realty and does not go to the administrators of the owner. Fay v. Muzzey, 13 Gray, 53 (1859). See, also, Carver v. Pierce, Sty., 66, 73 (1647); Aleyn, 32. [But see Gardner v. Perry, 39 Can. Law J., 670, 671 (Ont., 1903).]

accordance with said distinction in a case between executor and heir where the articles in question were erected for trade purposes solely as distinguished from mixed cases. The question was quite extensively considered in the House of Lords in the case of Fisher v. Dixon.[3] In this case the owner of land, for the purpose of better using and enjoying it, erected and affixed thereto certain machinery, consisting of engines, etc., to be used in working a coal and iron mine and works. This machinery was capable of being removed, but its removal would have been attended with a heavy expense and with more or less damage thereto. Some parts of it, as the engines for pumping the mines, were necessary in working the mines, and if removed very serious damage would have arisen to the mines unless immediately replaced. Upon this state of facts it was held that such machinery would go to the heir as a part of the realty; and that, if the corpus of the machinery belonged to the heir, all that belonged to such machinery, although more or less capable of being used in a detached state from it, [*220] *must necessarily follow the same principle and be considered as passing with the realty to the heir. In rendering their opinions the cider-mill case was criticised and treated as of no authority by every member of the court whose opinion is reported.[4] It was insisted in behalf of the appellant that it was

[3] 12 Cl. & Fin., 312 (1845); s. c., 9 Jur., 883.

[4] Lord Brougham said: "Great reliance was of course placed upon the case before Lord Hardwicke, in our Court of Chancery here, and a similar case which occurred more recently in the Court of Exchequer," [Trappes v. Harter, 2 Cr. & M., 150 (1833); s. c., 3 Tyrwh., 603]. "But there was an attempt made to distinguish this case in principle from that, and to show that there was another inconsistent decision in the cider-mill case. Now it is a remarkable circumstance that of that case we have only a very indistinct and unsatisfactory report. We have really nothing that can be called a record of that case. It was cited in the case before Lord Hardwicke; and I must also say, that if the cider-mill case is to be taken as it is represented to us, as regards the substance of the case, and in its result, my mind goes not at all with that decision. It is contrary, undeniably, to the general principles of our law upon the subject; and if the same questions were to arise to-morrow, with the circumstances which are represented to have attended that case, it would not, in my opinion, lead to the same result. Therefore I lay it out of view. We have a most imperfect account of the circumstances, and, above all, of the most material circumstances, of how the mill was affixed to the soil. For if a cider-mill be fixed to the

*necessary for the encouragement of trade that the erec- [*221] tions in question should be considered as not belonging to the real, but to the personal estate. But the court were unanimously of the opinion that the principle uopn which a departure had been made from the old rule of law in favor of trade, had no application whatever to questions arising between heir and executor in a case like this, where the individual who erected the machinery was the owner of the land and of the personal property which he erected and employed in carrying on the works.

soil, though it is a manufactory, and erected for the purpose of a manufactory, if it is really *solo infixum*, it is perfectly immaterial whether it is for the purpose of a manufactory, or a granary, or a barn, or anything else. It is a fixture on the soil, and it becomes part of the soil. Can any man say that one of the great brew-houses would belong to the executor because it is erected for the purpose of manufacture and wholly unconnected with the land? For a brew-house is as much unconnected with any crops upon the land upon which it is situated as a cider-mill can be said to be; it is for the purpose of brewing beer out of malt which need not have been raised on that land, but may have been grown in Russia or in Africa. It has nothing to do with the land, as may be seen by those who will take the trouble of looking at any of the brew-houses in London, which are established in places where it would be very difficult to find a blade of grass, much less a crop of barley of which to make malt. But although it is a manufactory, nobody says it belongs to the executor, nor constitutes what the Scotch generally call an executry fund; it would go unquestionably to the heir. The Scotch law appears to me only to differ from the English law in carrying the principles of our law, as laid down in the cases, a little further rather than falling short of them.'' Lord Campbell also said: ''The only case the other way which has been referred to is that of the cider-mill, where the essential circumstance is left entirely in doubt, whether, in fact, the mill was fixed to the freehold or not. We know that a cider-mill is not necessarily affixed to the freehold, a familiar instance of which is given in the Vicar of Wakefield, where, when a match was proposed between one of the Misses Primrose and young Farmer Flamstead, Moses said: 'I hope that, if my sister marries young Farmer Flamstead, he will lend us his cider-mill.' I take it that the cider-mill there was movable, and was not affixed to the freehold, but might have been carried from the farm of Farmer Flamstead to the vicarage of the Primroses.''

Mr. Wilbraham, however, in his citation of the case describes this mill as ''let in very deep into the ground,'' and as being ''certainly fixed to the freehold;'' and the above explanation seems hardly satisfactory. See Ferard Fixt., 177, note; also Wadleigh v. Janvrin, 41 N. H., 503, 515 (1860).

He might have disposed of the land or machinery, or have separated them again. It was, therefore, not at all necessary in order to encourage him to erect these new works which were supposed to be beneficial to the public, that any rule of that kind should be established, because he was master of his own land.[1] The cases of heir and executor, vendor and vendee and mortgagor and mortgagee, in the absence of evidence of specific intention contained in the deed affecting the question, which would of course prevail, have always been deemed identical in respect to their rights in a chattel claimed to be a part of the realty.[2] And according to the weight of authority, it seems well settled that, no intention to the contrary appearing, [*222] *trade fixtures pass to the vendee or mortgagee of the realty as parcel thereof, though as between landlord and tenant they might be removed by the tenant during his term.[3]

With reference to articles affixed to the freehold by the owner thereof for purposes of ornament or domestic convenience, though a contrary opinion has been maintained by some authorities,[4] the rule already laid down[5] is believed to be equally applicable; and the so-called exceptions are believed to be those articles of mere ornament or furniture movable in their nature, which in all respects are mere chattels and in no proper sense of the term fixtures; *e. g.*, carpets, which are temporarily tacked to the floor to keep them in place and with no intention of making them an accession to the realty, pictures, curtains etc., which are clearly mere chattels.[6] The reports give no

[1] See Climie v. Wood, L. R., 4 Exch., 328, 330 (1869); s. c., 38 L. J., Exch., 223, 225; 20 L. T. (N. S.), 1012, 1013; Mather v. Fraser, 2 Kay & J., 536 (1856); Walmsley v. Milne, 7 C. B. (N. S.), 115, 133, 136 (1859); and the cases therein cited. See, also, the early authorities cited at the beginning of this chapter (*ante*, p. *213). [See Walter Est., 10 Luz. Leg. Reg. Rep., 221 (1899).]

[2] See 21 H. 7, 26 b (1506), cited *ante*, p. *212; Price v. Brayton, 19 Iowa, 309 (1865); Murdock v. Gifford, 18 N. Y., 31 (1858). See, also, the cases cited in the preceding note and in the chapter discussing the relations of vendor and vendee, etc. [Adams v. Beadle, 47 Iowa, 439, 441 (1877).]

[3] See note next preceding.

[4] See Ferard Fixt., 178, note, 182, *et seq.*; Squier v. Mayer, and Harvey v. Harvey, referred to, *ante*. [See *Re* De Falbe [1901], 1 Ch., 523, 535.]

[5] See the early authorities cited at the beginning of this chapter.

[6] See Gibb. Fixt., 21; Swinb., part 7, sec. 10; Beck v. Rebow, 1 P. Wms.,

description of the hangings, tapestries, etc., mentioned in the cases of Squier v. Mayer, and Harvey v. Harvey, which possibly may likewise have been mere articles of furniture only temporarily fastened to keep them in place;[7] but if they were so attached as to show a design to make them a part of the house, as in the case of the tapestries, etc., in D'Eyncourt v. Gregory,[8] referred to in the preceding chapter, then unquestionably they would go to the heir. Each case must necessarily to a great extent be determined upon its own facts and the inferences as to intention to be drawn from them, in accordance with the principles stated in the first chapter of this work.

Thus, in Cave v. Cave,[9] it was held that although pictures and glasses, generally speaking, are part of the personal estate, yet if put up instead of wainscot, or where otherwise wainscot *would have been, they shall go to the heir, to whom the [*223] house ought not to come maimed and disfigured.

In the late case of Bainway v. Cobb,[10] the facts were as follows: A stone sink weighing about 200 or 250 lbs. was set by the owner of a dwelling in the corner of a room over a cistern, and under the spout of a wooden pump connecting therewith. The sink rested upon a wooden frame next the sides of the room (there being an unpainted strip on the walls back of the sink and frame), and was not nailed or fastened to the house, except that a lead pipe ran from a hole at one end under the sink through the side of the house into a drain. The pump not working well was soon removed, but the lead pipe remained till it wore out and was then taken away and a stopple used in the sink and the waste water drawn or dipped out. The sink remained in the same place and was used for washing dishes and in doing other necessary and appropriate domestic work for some twenty-five or thirty years, and till after the death of

94 (1706). See, also, Birch v. Dawson, cited *ante*, p. *7. [That chandeliers will go to the heir, see Smith v. Commonwealth, 77 Ky., 31, 33 (1878).]

[7] See Swinb., part 7, sec. 10, where hangings and carpets are mentioned as included in the term "household stuff."

[8] *Ante*, p. *192.

[9] 2 Vern., 508 (1705); s. c., 1 Eq. Ca. Ab., 275. See, however, Beck v. Rebow, 1 P. Wms., 94 (1706).

[10] 99 Mass., 457 (1868).

the owner of the house. Upon this state of facts it was held, that the removal of the pump and the decay of the pipe, no change being made otherwise in its position or use, did not amount to a severance of the sink from the freehold so as to convert it into personal property again, and therefore, that it descended to the heir as real estate, and did not devolve upon the administrator and next of kin as personal property. The ground upon which the case was decided seems to have been that, as shown by the purpose and mode of placing it upon the premises, as well as by its adaptation for daily use in ordinary domestic work, if not by its necessity to the completeness of the dwelling, it was intended by the owner to be a part of the realty.

In several other instances the courts in alluding to this subject have expressed opinions that there were no exceptions to the general rule that fixtures pass with the freehold to the heir, and that certain specified domestic fixtures, though removable as between landlord and tenant, passed to the heir and not to the executor;[11] and where the articles are really fixtures [*224] *partaking to some extent of the attributes of the realty, such seems to be in accordance with the weight of authority.

The rule that fixtures descend with the land to the heir, applies also to those articles which, though not in fact annexed and fixed to the realty, are yet an incident of and constructively annexed thereto, such as mill-stones, keys, and other articles of a like nature.[12]

The question whether an article which is attached to the realty descends therewith to the heir, or passes to the executor as a chattel, may also be influenced by custom. Thus, in refer-

[11] See Lawton v. Salmon, per Lord Mansfield, quoted *ante;* Winn (or Wynne) v. Ingilby (or Ingleby), 5 B. & Ald., 625 (1822); s. c., 1 D. & R., 247, where it is said that set pots, ovens, and ranges, affixed by the owner of the freehold, go to the heir and not to the executor. See, also, Colegrave v. Dias Santos, 2 B. & C., 76 (1823); Rex v. Inhabitants of St. Dunstan, 4 B. & C., 686 (1825), per Bailey, J.

[It is waste for an administrator to remove frame cabins, although ruinous, as they are a part of the realty; but he can not be charged with their value in his accounts. Reynolds v. Canal and Banking Co. of N. O., 30 Ark., 520, 525 (1875).]

[12] See the authorities cited in chapter I. (*ante,* p. *33). See, also, Fisher v. Dixon, referred to (*ante*); 1 Cru. Dig., chap. 3, tit. 1, § 7.

ring to the cider-mill case hereinbefore cited, Lord Mansfield in Lawton v. Salmon, gave it as his opinion that the decision was probably founded upon a custom. It was also held in a case tried before Eyre, C. B., at the Winchester summer assizes, in the year 1724, that according to the custom of the country, a granary built on pillars in Hampshire was a chattel, which went to the executors, and might be recovered in trover.[13] In Lowther v. Cavendish,[14] also, which was a case concerning the construction of a devise of lands and mines, a reference was ordered to inquire whether the timber and other materials laid down for making wagon-ways more commodious for carrying coal or other minerals from coal or other mines; and also fire-engines placed for the better working of such mines, were deemed and reputed in the county of Cumberland, and other counties in the north, fixed to the freehold, and passed therewith to the heir or remainderman, or went to the executor or administrator of the party erecting the same.[15]

*The common law rule as to the right to fixtures as be- [*225] tween the executor and heir of a tenant in fee, is also of course subject to change by legislative enactment. This has been attempted in the State of New York, where it has been enacted that "things annexed to the freehold, or to any building, for the purpose of trade or manufacture, and not fixed into the wall of a house, so as to be essential to its support," shall be deemed assets and shall go to the executor or administrator to be applied and distributed as part of the personal estate of their testator or intestate;[16] and that "things annexed to

[13] 11 Vin. Abr., 154, pl. 74.

See, also, as to effect of custom as between landlord and tenant, grantor and grantee, etc., the chapters where those relations are respectively considered.

[But a two-story wooden building can not be regarded as personal property because natives in former times frequently removed their house frame to another locality. Kahinu v. Aea, 6 Hawaii, 68, 69 (1872).]

[14] 1 Eden, 99, 118 (1758).

[15] See, also, Trappes v. Harter, 2 Cr. & M., 153, 181 (1833), the decision of which seems to have been somewhat influenced by custom.

[16] 2 R. S., p. 82, § 6, subdiv. 4. "It [the statute] cannot, however, alter the law as to the relation of vendor and vendee, whatever may be its effect as between heir and executor." Hunt, C., in Voorhees v. McGinnis, 48 N. Y., 284 (1872).

the freehold, or to any building, shall not go to the executor, but shall descend with the freehold to the heirs or devisees, except such fixtures as are mentioned in the fourth subdivision of the last section."[17] By section 8 it was provided that "the right of an heir to any property not enumerated in the preceding sixth section, which by the common law would descend to him, shall not be impaired by the general terms of that section." In the construction of the 4th subdivision of section 6 above quoted it was held in House v. House,[18] that the water-wheels, mill-stones, bolting-apparatus and running-gear of a grist and flouring-mill and other fixtures of the same character were parts of the freehold and descend to the heirs-at-law as real property. In delivering his opinion, Walworth, Ch., said: "Previous to the adoption of the revised statutes there was a distinction supposed to exist in relation to what was to be considered a part of the realty, as between landlord and tenant, and as between the heir-at-law and the personal representatives. It was also supposed that an outgoing tenant might be permitted to remove fixtures of a particular description placed by him upon the premises for a special purpose, which as between the heirs-at-law and the personal representatives of the owner of the freehold would have descended to the [*226] *heirs. But the legislature, whether wisely or otherwise it is not for me to decide, in adopting the provision here referred to, probably intended to put the executor or administrator upon the same footing with a tenant as to the right to fixtures. Such at least was the recommendation of the revisers, as appears from their note to the 6th section in which this provision is found. (3 R. S., 639, 2d. ed.)[19]

"It was impossible, however, to define in a short sentence of three lines, what was to be considered a part of the freehold itself, and what were mere fixtures or things annexed to the freehold for the purposes of trade or manufacture, and I think, in this case, it may be safely assumed that it could not have been the intention of the legislature to authorize the personal representatives of the decedent who owned this grist-mill in fee at the time of his death, to strip it of its water-wheels,

[17] Id., p. 83, § 7.

[18] 10 Paige, 158 (1843); s. c., 2 N. Y. Leg. Obs., 206.

[19] See Buckley v. Buckley, 11 Barb., 43, 53 (1850).

mill-stones, bolting apparatus, and running-gear: leaving to the heirs-at-law the mere sides or walls of the building, with its floors, partitions and roof. Such, however, as I understand it, is the claim made by the defendants in this case. For it is not stated in the answer that there were any other fixtures in this grist-mill and flouring-mill, except machinery and other apparatus of that character and description. Fixtures of the character here claimed are not only convenient, but essential to the proper enjoyment of the inheritance; and are therefore as much a part of the freehold as the building and water-power, which with them constitute the mill. The claim of the defendants to the fixtures must therefore be rejected."

This construction of the statute was approved and followed in Buckley v. Buckley,[20] Hand, J., in a well-considered opinion there observing that it was difficult to see how any other construction could be given without doing incalculable mischief; and that language should be very explicit and imperative before it receives an interpretation so disastrous in its consequences. This construction was also approved in Murdock v. Gifford,[21] though not necessary to the decision of the case; and, *although Denio, J., in Ford v. Cobb,[22] expressed him- [*227] self as not being entirely satisfied with the reasoning of the chancellor in House v. House, it may doubtless be regarded as the settled construction of the statute; and, notwithstanding said statute, it seems still necessary in that State to resort to the principles of the common law and to the decisions of the courts, in order to ascertain what is parcel of the freehold and passes as such to the heir.[23]

[20] 11 Barb., 43, 62 (1850).

[21] 18 N. Y., 28, 32 (1858).

[22] 20 N. Y., 344, 348 (1859).

[23] See, also, Coey's Estate, 1 Tuck., 125 (1865).

See, however, Farrar v. Chauffetete, 5 Den., 531 (1848); Hovey v. Smith, 1 Barb., 372 (1847), where it was *held*, that a pump and pipe, balances and scales, and a beer-pump were *prima facie* personal property, which, as it was said, could only descend to the heir as against the administrator in consequence of being annexed to the freehold in such a manner and under such circumstances as to come within the provisions of said statute. In this case, however, it did not appear from the transcript whether the articles in question were annexed to the freehold at all, or, if so, whether for purposes of manufacture or not.

[*228] CHAPTER VII.

CHARTERS, HEIR-LOOMS, ETC.

There are some things, in themselves chattels, which are considered as so annexed, and necessary to the enjoyment of the inheritance, as to be deemed in law an incident or part of it, and so descend with it to the heir.[1] Such are charters, heir-looms, etc., which as the questions concerning them usually arise between heir and executor, may be conveniently considered in this place.

I. Charters.

In the United States, the registration in public offices of deeds of conveyance being universally provided for by statute, the grantor usually retains his own muniments of title; and, the grantee being ordinarily permitted to give in evidence certified copies from the record of all deeds under which he claims or deduces title, to which he was not himself a party, and of which he is, therefore, supposed not to have the control,[2] the subject of this section has lost much of the importance that it would otherwise possess and still possesses where there are no such statutes. This and the kindred subject of heir-looms, etc., being, however, usually treated of in professed works upon the law of fixtures, and there being (with only two or three exceptions) no cases to be found in the [*229] *reports of this country upon these subjects, it is thought not inexpedient to present them here in the words of the English author, Mr. Ferard,[3] with such additional matter as may be found in the books published since the publication of his work: "Charters or deeds relating to the inheritance, are the

[1] See 1 Cru. Dig., Chap. 3, tit. 1, § 5.

[2] See 1 Greenl. Cru. Dig. (2d, ed), tit. 2, ch. 1, § 39, note 1; 2 id., tit. 32, ch. 11, § 19, note 1. [Gay v. Warren, 115 Ga., 733, 734 (1902).]

[3] Ferard Fixt., 189, *et seq.*

evidential muniments of the estate. They are, as Lord Coke expresses it, the sinews of the land. On this account, the law provides that they shall always follow the land to which they relate, and shall vest in the heir, and pass to the alienee, as incident to the estate, *et ratione terræ.*"[2] So land-warrants authorizing the selection and location of certain amounts of land out of the unappropriated lands of the United States are regarded as real estate and pass to the heir-at-law unless specifically devised.[3] But, although in general the heir is entitled to the possession of the muniments of title to real estate, yet, as against a stranger, the executor or administrator, where there are statutes making land assets in his hands *for the payment of debts on a deficiency of personal [*230] estate, is entitled to the possession of such muniments of title.[4]

"If the land is forfeited (as for treason or felony) the char-

[2] 20 H. 7, 13 b (1504); 21 H. 7, 27 (1506); Co. Lit., 6 a; 11 Co., 50, Liford's Case (1614); Fitz. Nat. Brev., Detinue; Com. Dig., tit. Charters, A; Wilson v. Rybolt, 17 Ind., 391 (1861). See, also, 1 Co., 1; Mo., 488, pl. 687; Lord v. Wardle, 3 Bing. N. C., 680 (1837); Atkinson v. Baker, 4 Term, 229 (1791). [Masiamah v. Pachak, 4 Kyshe, 444, 445 (Straits Set., 1889).]

If a man seised of lands in fee simple and having divers evidences and charters, some containing warranty and some not, conveys the land over to another without warranty, the purchaser shall have all the charters and evidences as incidents to the land though not granted to him by express words. Lord Buckhurst's Case, 1 Co., 1 (1598); s. c., Mo., 488; 2 Anders., 118.

But where a man conveys with a warranty, he has a right (unless the deeds are expressly granted) to retain all evidences which contain warranty, or serve to deraign the warranty paramount, or which are material to maintain the title of the land; but the feoffee shall have such evidences as concern the possession and not the title. Lord Buckhurst's Case (*supra*); Co. Lit., 6 a, and authorities there cited. As to the rule in cases where a man sells only part of his estate, retaining the residue himself; and where lands held under one title are sold to two or more persons in separate parcels, see Yea, Bart. v. Field, 2 Term, 708 (1788); 2 Sugd. Vend. (8th Am., 14th Lond. ed.), 433, *452; notes to Lord Buckhurst's Case, 1 Co., 1, *et seq.* (Lond. ed., 1826).

[3] Atwood v. Beck, 21 Ala., 590 (1852).

[4] Cummings v. Tindall, 4 Stew. & Port., 357 (1833); Towle v. Lovet, 6 Mass., 394 (1810). See, also, Hall v. White, 6 C. & P., 136 (1827). [See Mills v. Mead, 14 Supr. Ct. (7 Hun), 36, 38 (N. Y., 1876).]

ters or evidences which belong to the land are also forfeited.[5] From this, their strict relation to land, they have even been accounted for some purposes not to be chattels.[6] And, therefore, it is said, that if a man gives and grants *omnia bona et catalla,* his charters concerning his land shall not pass by these words.[7] They are, nevertheless, so far in the nature of personalty, that an action of trover, detinue or trespass *de bonis asportatis,* will lie for them.[8]

"There seems formerly to have been some difference of opinion with regard to the box or chest in which charters are preserved, whether this also should pass to the heir; and distinctions have even been taken as to the box being sealed or locked, or otherwise. In Rolle's Abridgment[9] it is said, that if charters are in a chest, the executors shall have the chest, and the heir the charters; and if the chest is shut, the heir shall have the chest also; but if it is not shut, the executors shall have the chest. And Swinburne lays it down,[10] that the box ensealed, though the same be not affixed to the freehold, yet [*231] *because it contains those things which belong to the heir, it also belongs to the heir, and not to the executors. But

[5] Staun. Pl. Cor., lib. 3, ch. 26.

[6] Noy's Maxims, p. 359 (9th ed.). *Vide,* 2 Roll. Ab., 108, *Ley Gager,* E, F; 11 Vin. Ab., 178.

[7] "Perkins, § 115; Shep. Touch., ch. 5, p. 97; Bro. Ab., Chattels, pl. 9; Roll. Ab., Grant, X. The law considers them as partaking so much of the nature of land that larceny at common law cannot be committed of them. 1 Hale, P. C., 510; Leach's C. L., 13. But see 1 Hawk., 142, and 10 E. 4, 14, where a different reason is suggested for this rule. See now the stat., 7 & 8 Geo. 4, ch. 29, § 21, *et seq.;* Rex v. Walker, R. & M., 155.

"Charters are not distrainable as chattels." [See, *post,* p. *360.]

See, however, as to the subject of larceny (*post,* p. *449) under the head of crimes relating to fixtures. [By statute a deed to land is the subject of larceny in Mississippi. State v. Hughes, 80 Miss., 609 (1902).]

[8] Cru. Dig., Charters, D; Action upon the Case, Trover, C; Trespass, A 1; *vide,* 3 B. & C., 225; 2 Br. & B., 650; Wilson v. Rybolt, 17 Ind., 391 (1861). [See Gay v. Warren, 115 Ga., 733, 734 (1902); King v. Gilson, 32 Ill., 348, 354 (1863); and, *post,* p. *417, under "Replevin."]

[9] Roll. Ab., tit. Ex'rs, U; Id. tit., *Ley Gager,* F.

[10] Treat. on Wills, p. 759. See, also, 11 Vin. Abr., 166 and authorities cited; Plowd., 323, per Wray, J.; Cowell's Inst., 62, 63.

of these distinctions, the author of the Law of Testaments observes, that they seem not to be well taken. For, he says, if it be a box prepared for the keeping of the deeds, the heir ought to have it, whether locked or open; on the other hand, if it be a box designed for other use, as for the keeping of linen, it cannot be said to be appurtenant to evidences, although some be in it, for so be many other things also; or, perhaps, it may be a chest or cabinet of great value; surely this shall not go to the heir, when perhaps there is not personal estate sufficient to pay the testator's debts.[11] In like manner in Wentworth's Office of Executors it is said, that the distinctions taken in the old cases are not grounded in good reason; and in Comyn's Digest it is laid down, in general terms, that the chest passes to the heir.[12]

"But it is to be observed that those deeds and writings only are here intended which concern land, and relate to the freehold and inheritance. For such as relate to personalty, as terms of years, goods, etc., will belong to the personal representative, together with the chattel interest to which they refer.[13] So, also, if the writings of an estate are pawned or pledged for money lent, they are considered as chattels in the hands of the creditor, and in the case of his decease, they will go to his personal representative, as the party entitled to the benefit accruing from the land."[14]

[11] Law Test., 381; *vide*, 4 Burn's Ecc. Law, 304.

[12] "Com. Dig. Biens, B, Charters, A. See upon this subject 36 H. 6, p. 27; Finch, book 1, p. 16; Plowd., 323; Bro. Abr., Chattels, 18; Roll. Abr., Grant, X, pl. 5; Godolph. Orph. Leg., part 2, ch. 13; Shep. Touch., 470; Noy's Max., 239 (9th ed.). It is said that larceny cannot be committed of the box in which charters are kept. 1 Hale, 510; 3 Inst., 109." See (*post*) Larceny, p. *417.

[13] Off. Ex., 63; 3 Bac. Abr., 65.

[14] "Shep. Touch., 469; Tollers' Executors, 231. To whom the possession of deeds appertains in different cases, see upon a warranty of title, Lord Buckhurst's Case (*cited ante*); Harg. Co. Lit., 6 a, N, 4; in case of estates for life or in tail, Finch, B. 1, ch. 3, p. 23; Id. B. 2, ch. 2, p. 88; 2 P. Wms., 471; in case of a purchase not completed, 3 B. & C., 225; and for other cases upon this subject, see Fitz. N. B., Detinue; 1 Dick., 650; 1 Eden, 8; 2 Term, 708; 2 Taunt., 268; 6 Taunt., 12; 4 Bing., 106."

[*232] *II. Heir-Looms, etc.

"Another instance in which property may pass to the heir, although it is in itself of a personal nature, is in the case of heir-looms.[15]

"Heir-looms, chiefs or principals, are those things which have continually gone with the capital messuage,[16] and which upon the death of the owner descend to the heir along with and as a member of the inheritance, according to the custom of some countries.[17] An heir-loom, in its strict and proper sense, is always some loose personal chattel, such as would ordinarily, and but for the particular custom, go to the personal representatives of the deceased proprietor.[18] Lord Holt, indeed, is reported to have said, that goods in gross cannot be heir-looms, but that they must be things fixed to the freehold, as old benches, tables, etc.,[19] and it is observable that Spelman thus defines an heir-loom: *'Omne utensile robustius quod ab ædibus non facile revellitur, ideoque ex more quorundam locorum ad hæredem transit tanquam membrum hæreditatis.'* [20] But the instances met with in the different authorities are always things of a mere personal chattel kind not affixed to the house or land, such as the best bed, table, pot, pan, cart, or other dead chattel movable. These are the only kind of heir-looms mentioned by Lord Coke;[21] and he illustrates his [*233] *remarks upon them by this citation from the old entries: *'Consuetudo hundredi de Stretford in Com' Oxom' est,*

[15] No instance has been found where the law of heir-looms has been recognized as a part of the jurisprudence of the United States. Hence the subject is presented in the words of Mr. Ferard (p. 192, *et seq.*).

[16] 14 Vin. Abr., 290.

[17] "But the heir-looms is due by custom and not by the common law." Co. Lit., 18 b.

[18] Co. Lit., 18 b, 185 b; 1 Wms. Exrs. (6th Lond. ed.), 681. The custom which entitles the heir must be strictly proved. 1 Wms. Exrs., 681; 2 Bl. Com., 428.

[19] Lord Petre (or Peter) v. Heneage, 12 Mod., 520 (1701), at *nisi prius*. But see, s. c., 1 Ld. Raym., 728: "A jewel can not be an heir-loom, but only *things ponderous*, as carts, tables," etc. See, however, Co. Lit., 18 b, that the ancient jewels of the crown are heir-looms.

[20] Spelman's Gloss. *voce* Heir-loome.

[21] Co. Lit., 18 b.

quod haredes tenementorum infra hundredum prædictum existentium post mortem antecessorum suorum habebunt, etc., principalium, Anglice, an heire-loome, viz.; *de quodam genere catallorum, utensilium, &c., optimum plaustrum, optimam carucam, optimum ciphum, &c.'*

"So in *Les Termes de la Ley* an heir-loom is said to be 'any piece of household stuff (*ascun parcel des utensils d'un mease*), which by the custom of some countries, having belonged to a house for certain descents, goes with the house (after the death of the owner), unto the heir, and not to the executors.'

"Sir William Blackstone, in the Commentaries, describes heir-looms as 'goods and chattels,'[22] and always treats them as personalty; though (with some degree of inconsistency, perhaps), he says, they are generally such things as cannot be taken away without damaging or dismembering the freehold. And in one part of the Commentaries[23] he says expressly, 'an heir-loom, or implement of furniture, which by custom descends to the heir, together with an house, is neither land nor tenement, but a mere movable.'[24]

"And indeed, if by heir-looms were to be understood only matters affixed to the freehold, it would follow that there are some articles attached to the realty which require the aid of custom to make them descendible with the inheritance, and which, but for such custom, would legally belong to the executor. Such a principle, however, is altogether inconsistent with the general rule respecting annexations to the freehold; unless, indeed, it be thought that in these cases, the chief operation of custom upon a matter which would, of itself, necessarily pass to the heir as parcel of the freehold, is by imparting it to a further incident (which will presently be noticed), viz.: that of *making it inseparable and inalienable from the inheri- [*234] tance by devise.

"But, besides heir-looms, properly so called, there are certain species of chattels which may be considered in the nature of heir-looms, and which are also held to pass to the heir with the

[22] 2 Com., 427, 428.

[23] 2 Com., 17.

[24] And see to the same effect, Roll. Abr., Descent, E.; Doct. & Stud., dial. 2, ch. 40, p. 228. So the heir may recover an heir-loom in detinue. Bro. Abr. Detinue, pl. 30.

inheritance. The things referred to, seem, however, to differ from those that are strictly heir-looms, because the title of the heir in these cases does not depend upon any local custom. And an attention to this distinction would remove the confusion which has sometimes arisen from classing under the general name of heir-looms all those personal chattels which the law gives to the heir as part of, or incident to, his inheritance." Thus the coat-armor, pennons, and arms of a deceased ancestor hung in a chapel, where such ancestor is buried, in honor of the deceased, do not belong to the parson; and the wife who set them up, and after her death the heir of the deceased may have an action for their removal, because they were hung there for the honor of the ancestor and are in the nature of heir-looms, which belong to the heir as being the principal of the family.[25] And the law is the same respecting grave-stones, tombs, and the like.[26]

In Atcherley v. Vernon,[27] the point was raised and strongly insisted upon that MSS. reports of cases in chancery should go to the heir-at-law, as guardian of the reputation of his ancestor, after the analogy of the action which lies to the heir, if the tomb or monument of an ancestor be defaced or destroyed. The point was not, however, decided, because all parties consented to have them printed under the direction of the court.[28] It is said also that, "in like manner, ancient portraits and family pictures, though not fastened to the walls of the house, accompany the inheritance; and the executor is not allowed to [*235] *remove them, although they are mere personal chattels."[29] "So, also, the collar of S. S. and garter of gold, descend as ensigns of honor and state, in the way of heir-looms; and this, even although there may be a special bequest of all

[25] See Dame Wiche's Case, 9 Edw. 4, 14, pl. 8 (1469), cited in Corven's Case, 12 Co., 105 (1687); Frances v. Ley, Cro. Jac., 367 (1615); Godb., 199, 200; 1 Brownl., 45; Noy, 104; 2 Bulst., 151; Vin. Abr., Descent, E; Com. Dig., Cemetery, C; Co. Lit. 18 b.

[26] See next note (*supra*); also the following pages.

[27] 10 Mod., 529 (1723). See, also, Upton v. Lord Ferrers, 5 Ves., 801 (1801); 1 Wms. Exrs. (6th Lond. ed.), 683.

[28] See The Reporters, 308; 2 Morgan's Law of Literature, § 436.

[29] Ferard Fixt., 195, citing the authorities in note (1), supra, p. *234.

jewels.[30] And so the ancient jewels of the crown are accounted heir-looms,[31] because they are necessary to maintain the state, and support the dignity of the sovereign for the time being.[32] Again, as was noticed in a former page, the ornaments of a bishop's chapel are considered to be of the nature of heir-looms, and as such pass to the successor in the see.[33] And in like manner, things belonging to ecclesiastical houses, and which have continually passed from successor to successor, have sometimes been esteemed as heir-looms.

"Moreover, the heir may sometimes claim a right to a personal chattel, from the peculiar manner under which the estate is holden. Thus, an ancient horn, where the tenure of the land is by cornage, shall always descend to the heir.[34] But things of this description seem rather to resemble charters of inheritance; or they might perhaps more properly be ranked among *some of the species of possession which are treated of [*236] in the ensuing pages.

"But further, a testator may by his will constitute what has been called a *quasi* heir-loom. That is to say, he may demise

[30] 11 Vin. Abr., 167, citing the Earl of Northumberland's Case, Owen, 124 (1584). See, also, Swinb., part 3, sec. 6; Lord Petre (or Peter) v. Heneage, 12 Mod., 520 (1701); s. c., 1 Ld. Raym., 728. For an explanation of the collar of S. S., see Selden's Titles of Honor. Mr. D'Israeli, from an article among the Sloane MSS., and also Lord Campbell in his Lives of the Chief Justices, relate that after Lord Coke's dismissal, the new Chief Justice sent to him to purchase his collar of S. S. But Lord Coke replied that "he would not part with it, but leave it to his posterity, that they might one day know that they had a Chief Justice to their ancestor." D'Israeli's Curiosities of Literature, 2d series, Vol. 1, p. 298. 1 Camp. Lives of the Chief Justices, p. 301, citing Nichols' Progresses of James, Vol. 3, 228.

[31] 2 Bl. Com., 14 Vin. Abr., 290; Swinb., part 3, sec. 6, p. 251; Co. Lit., 18 b.

[32] See the note of Mr. Ferard (page 195), respecting certain dispositions made of the crown jewels of England by Kings James I. and Charles I.; Rymer's Foed., Vol. XVI., p. 641, and Vol. XVIII., p. 236.

[33] *Ante*, p. *201.

[34] Pusey v. Pusey, 1 Vern., 273 (1684). As to tenure by cornage, vide Co. Lit., 107 a. Of the Pusey and other horns, as a charter or instrument of conveyance, see several curious particulars in the Archæologia, vol. 3, p. 1, *et seq.* And see Id., vol. 1, p. 168; vol. 5, p. 340; vol. 6, p. 42.

or limit in strict settlement, an estate and capital mansion, together with personal property, as the plate, pictures, library, furniture, etc., therein, such plate, etc., to be enjoyed, together with the house and estate, unalienable by the devisees in succession, so far as the law will allow.[35] Limitations of this sort depend upon the principles of executory devises, and the doctrines of equity; for a remainder, in the strict sense of the term, can only be limited of a freehold estate. This subject has given rise to many questions of considerable nicety; and it will be sufficient, on the present occasion, to observe generally, that upon such a devise or settlement, the absolute interest in the chattels, subject to the interest for life which may be created in them, will vest in the person who is entitled to the first estate of inheritance, whether in tail or in fee; and upon his death the property will devolve upon his personal representative.[36]

[35] Wood. Vin. Lec., vol. 2, 380. See Cadogan v. Kennet, Cowp., 432 (1776); Foley v. Burnell, Cowp., 435 *in notis* (1783); 1 Br. Ch., 279; 4 Bro. P. C., 319; 2 Atk., 82, 321; 3 P. Wms., 336. And see Fearne's Exec. Dev. (6th ed. by Butler), 407; Harg. Co. Lit., 18 b, N. 109.

[36] The several decisions upon this subject, are collected in Roberts' Treatise on Wills, Vol. 2, p. 295, *et seq.* See, also, Bridgewater v. Egerton, 2 Ves. Sr., 121 (1750); s. c., 3 Id., Suppl't, 296; Carr v. Lord Erroll, 14 Ves., 478 (1808); Vaughan v. Burslem, 3 Bro. C. C., 101 (1790); Gower v. Grosvener (or Levison), Barnard. Ch., 54 (1740); s. c., 5 Mad., 337; Brownecker v. Bagot, 19 Ves., 574 (1816); Foley v. Burnell, 1 Bro. C. C., 274 (1783); s. c., 4 Bro. P. C., 319; Rowland v. Morgan, 2 Phill. Ch., 764 (1848); s. c., 6 Hare, 463; Countess of Lincoln v. Duke of Newcastle, 3 Ves. Jr., 387 (1806); s. c., 12 Id., 218; 2 Roper on Leg., ch. 22, sec. 4; 2 Jar. on Wills, *507. [*Re* Hill [1902], 1 Ch., 537, 807; see, also, *Re* Viscount Exmouth (1883), 23 Ch. D., 158.]

Things consumable in the use, as provisions, liquors, corn, hay, etc., cannot be limited as heir-looms. See Boon v. Cornforth, 2 Ves. Sr., 277, 280 (1751).

In Clarke v. The Earl of Ormonde, 1 Jac., 115 (1821), Lord Eldon observed "that heir-looms are a kind of property that are rather favorites of the Court," and "that the Court in its ordinary decrees directs at first only an account of the testator's personal estate not specifically bequeathed." It is the duty of the executors as far as possible to preserve articles specifically bequeathed as heir-looms, according to the testator's intention; and unless compelled, they ought not to apply them to the payment of debts, but to devote to that purpose that part of the property given for that purpose.

*"With respect to heir-looms, properly so called, viz., [*237] those depending on custom, it appears that they cannot be devised away from the heir; that is to say, when the inheritance to which they belong descends to him. For Lord Coke lays it down, that 'if a man be seized of a house, and possessed of divers heir-looms that by custom have gone with the house from heir to heir, and by his will deviseth away the heir-looms, this devise is void.'[37] Upon this it has been observed by Professor Woodeson in his Vinerian Lectures,[38] that the opinion of Lord Coke is founded upon a decision in 1 Hen. V., 108, which, he thinks, being prior to the Statute of Wills, could only amount to a determination against such a devise of heir-looms separately from the house by way of personalty; and he supposes that at present they might be devised as realty distinct from the estate. Upon reference, however, to the passage in Co. Lit., it appears that Lord Coke grounds his opinion upon a principle which applies as well to a devise of realty as of personalty, viz.: that the custom vests the property in the heir instantly upon the death of the testator, and takes place of the devise, which has effect only after the death of the testator. And although this reasoning has not been universally assented to, yet the doctrine appears to have been recognized by many subsequent authorities.[39]

*"The owner of the inheritance, however, may during [*238] his life, sell or dispose of these customary heir-looms, as he may

By the modern practice in the Court of Chancery, all that is required of the tenant for life on delivery to him of chattels limited as heir-looms, is an inventory signed by him, specifying that they belong to the first taker for the particular period only, and afterwards to the person in remainder, and an undertaking to take proper care of the heir-looms, except in case where danger is apprehended, when security may be required. Conduitt v. Soane, 1 Colly. Ch., 285 (1844); Foley v. Burnell, 1 Bro. C. C., 279 (1783); s. c., 4 Bro. P. C., 319; Covenhoven v. Shuler, 2 Paige, 122, 131 (1830); 1 Story's Eq. Jur., § 604, and cases there cited.

[37] Co. Lit., 185 b. So, per Lord Coke, the crown jewels are not devisable by testament. Co. Lit., 18 b.

[38] Vol. 2, p. 380.

[39] Com. Dig. Biens, B, H; Harg. Co. Lit., 18 b; per Lord Macclesfield Chanc., 1 P. Wms., 730. And see Mr. Serj. Hill's MS. note, 14 Vin. Ab., 290, in Linc. Inn Lib.; Shep. Touch., 432.

of the timber of his estate.[40] And if he devise the house away from the heir, it is presumed that in this case the heir-looms would pass with the house to the devisee."[41]

It may be observed in concluding this subject, that the Court of Chancery has jurisdiction of a bill for the specific delivery of an heir-loom or a chattel in the nature of an heir-loom.[42]

III. Annexations to the Freehold of the Church.

It has already been stated in the preceding section, that the coat-armor, pennons, arms, etc., of a deceased ancestor, hung in a chapel in honor of the deceased, do not belong to the parson, but to the heir. In like manner he who has erected on the freehold of the church a grave-stone, tomb or the like, to the memory of another, may maintain an action for any injury done thereto in his life time by the parson or other person; but after the death of him who erected it, if any injury is done thereto, the action belongs not to his executor or administrator, but to the heir of him to whose memory it was erected; and this though the article in question be annexed to the freehold of the parson.[43]

[*239] *These remarks do not apply, however, where the thing in question was set up without the consent of the ordinary or

[40] 2 Bl. Com., 429.

[41] That, if an estate be devised in tail with remainders, the devise over is good as to the heir-looms as well as to the estate. See Mr. Serj. Hill's MS. note, 14 Vin. Ab., 291.

[42] Earl of Macclesfield v. Davis, 3 Ves. & Bea., 16 (1814); Pusey v. Pusey, 1 Vern., 273 (1684); Fells v. Read, 3 Ves. Jr., 70 (1796). See, also, Seale v. Hayne, 9 L. T. (N. S.), 571 (1864); s. c., 12 W. R., 239; 9 Jur. (N. S.) (1338).

[43] See Corven's Case, 12 Co., 105 (1687); Frances v. Ley, Cro. Jac., 367 (1615); Godb., 200; Sabin v. Harkness, 4 N. H., 415 (1828); Spooner v. Brewster, 2 C. & P., 34 (1825); s. c., 10 Moore, 494; 3 Bing., 136; Co. Lit., 18 b; Moore, 878; 3 Inst., 110, 202; 1 Roll. Ab., Descent, E; Sid., 206; Cro. Eliz., 366; 2 Roll. Rep., 140; Doct. & Stud., pages 305, 309; Com. Dig., Cemetery C. See, also, Hitchcock v. Walford, 5 Scott, 792 (1838).

As to the right to erect monuments in a church, see Degge, (7th ed.), 217; 3 Inst., 202. See, also, 1 B. & Ald., 508; 1 Stra., 576; 2 Stra., 1080; 1 Hagg., 14, 205; 3 Add., 15; 1 Lee, 640; 1 Curt., 880; 8 B. & C., 288; Rogers' Eccl. Law, 187.

other proper authority, who, it seems, in such case may order their removal without incurring liability to the heir.[44] So, the property of a winding sheet and coffin remains in the executor or other person who was at the charge of the funeral, and who had property therein when the dead body was wrapped therewith and enclosed therein, for the dead body being but a lump of earth hath no capacity and is not capable of it; and a stealing of such articles is a felony.[45]

"But things that are fixed up in a church not in honor of individuals, but for other purposes, as when a church is hung in mourning, or when ornaments or erections, as scaffoldings, etc., are put up on public occasions, these become the property of the parson, in consequence of his possession of the freehold, and on the ground of their being a tacit gift to him.[46]

"With respect to pews and seats erected in a church, these become by annexation parcel of the freehold of the incumbent, though the use of them is in those who have the use of the church,[47] and, therefore, if seats have been annexed to the church without legal authority, it is said that the property of the

[44] Palmer v. Episcopum Exon, 1 Stra., 576 (1723). See, Gib. Cod., 454.

[45] Hayne's Case, 12 Co., 113 (1614-5); Wms. Exrs., (2d Ed.), 505.

[A coffin is the property of the person who buried the deceased, and the stealing thereof is larceny. State v. Doepke, 68 Mo., 208 (1878).]

["There can be no property in a corpse, and there is none in the shroud which surrounds it, when that corpse has been once committed to the tomb." The casket is in the possession of the owners of the fee, and replevin therefor will not lie. Guthrie v. Weaver, 1 Mo. App., 136 (1876).]

[A grantee acquires no right to bodies of the dead. Barlow v. Hudson, 5 Ky. Law Rep., 604 (1884).]

[46] Ferard Fixt., 204, citing Cases and Opinions, Vol. 1, p. 273; also, Cramp v. Bayley, Clk., Kent Lent Ass., 1819, cited in the notes to the edition of Degge's Parson's Counselor, by Ellis, p. 218; Prideaux's Directions, p. 87, and the authorities there referred to. In this note he says: "It is certainly true that the soil and freehold of the church and churchyard is in the parson; but the freehold is in him not for his own emolument, but for public purposes only, as for supplying places for sepulture," etc.

No reason is seen why the rules laid down in Chapters 2 and 3 should not be applied to this relation so far as applicable.

[47] 8 H. 7, 12; Bro. Abr. Chattels, pl. 11; 1 Term, 430; 5 B. & Ald., 361. And see 1 Phill., 322; 3 Id., 11.

materials when pulled down is in the parson, who may sue the wrong-doer in trespass. But as to seats put up by the parishioners by good authority, it seems, according to the ecclesiastical writers, that the property of the materials upon removal [*240] *will be in the parishioners, and that the church wardens and not the parson may maintain an action for taking them away.[48] With respect, however, to movable seats in a church, the party that set them up may remove them at his pleasure."[49] This subject is in the United States to some extent regulated by statutes, which in some of the States declare pews in churches to be real and in others personal property. In the absence of statutes affecting the question, they are considered to be in the nature of realty. The interest of the pew-holder in such case is an exclusive easement in for special purposes, and not a title to a freehold, the general property in the house and land usually being in the corporation that erected it.[50]

"If a man hang up bells in the steeple, they become church goods, although they may not be expressly given to the church; he cannot therefore afterwards remove them; and if he does, he may be sued by the church-wardens, to whom the custody and possession of the goods of the church belong, though the property of them is in the parishioners.[51] The property of the bell-ropes is in the church-wardens.[52] So, if a man take the organ out of a church, the church-wardens may have an action

[48] Degge (7th ed.), p. 213; Burn's Eccl. Law., Vol. 1, tit. Church. Noy, 108; *vide,* Shaw's Par. Law, ch. 25, sec. 9; Prideaux, 73.

[49] Degge, 211. This, however, seems to be questionable. Wats., ch. 39; Burn's Just., tit. Churchwardens, sec. 3. And see Shaw, ch. 25, sec. 7; Prideaux, 32.

[50] See, generally, 3 Kent Com., 402; 1 Wash. Real Prop., *9; Wash. Easem., *515, and notes, and the authorities there cited. [Union Mtg. Hs. v. Rowell, 66 Maine, 400, 402 (1877); First Presbyterian Soc. v. Bass, 68 N. H., 333, 337 (1893); see, also, Rose v. Baltimore, 51 Md., 256, 270 (1878).]

[51] 11 H. 4, 12; Degge, 217; Burn's Eccl. Law, *ub. sup.;* Com. Dig., *Esglise,* F 3; Cro. Eliz., 145; 2 Salk., 547; 1 Sid., 281; 2 Keb., 22.

That bells are parcel of the freehold of the church, see 11 H. 4, 12; Sid., 206; 1 Lev., 136, s. c. As to the origin of bells and chimes, and some curious observations upon them, see Lutw. Nelson, 327; 1 Salk., 164; Roll. Ab., Prohibition, K; Sid., 206. See, also, Hook's Church Dictionary, tit. Bells.

[52] Jackson v. Adams, 2 Bing. N. C., 403 (1835).

of trespass against him; because the organ belongs to the parishioners and not to the parson, and the parson cannot sue the taker in the Ecclesiastical Court.[53] And the succeeding churchwardens may sue, although the trespass was done in the time of their predecessors.[54]

*"The trees growing in a church-yard belong to the [*241] incumbent, and he may bring his action, if they be cut down."[55]

IV. Deer, Fish, etc.

The qualified or special right of property said to exist as to game, that is as to animals *feræ naturæ* which are fit for the food of man, whilst they continue in their wild state, seems to be no more than the exclusive right to catch, kill, and appropriate such animals; or in other words to reduce them into possession, for no man hath an absolute property in anything which is *feræ naturæ*.[56] This right as to animals *feræ naturæ* is said to exist *ratione impotentiæ, ratione soli,* or *ratione privilegii.* Property *ratione soli* is the common law right which every owner of land has to kill and take all such animals *feræ naturæ* as may from time to time be found on his land, and as soon as this right is exercised the animal so killed or caught becomes the absolute property of the owner of the soil. Property *ratione privilegii* is the right which by a peculiar franchise

[53] 1 Roll. Abr., 393.

[54] Cro. Eliz., 145, 179; 1 Leon., 177.

[55] "Bro. Abr., Tresp., 210; Lindw., 267; 2 Atk., 217.

The preamble of the ancient stat., 35 Ed. 1, § 2, entitled '*Statutum ne Rector prosternat Arbores in Cœmitario,*' recites that 'Forasmuch as a church-yard that is dedicated, is the soil of the church, and whatsoever is planted belongeth to the soil, it must needs follow that those trees which be growing in the church-yard, are to be reckoned amongst the goods of the church, the which laymen have no authority to dispose; but as the Holy Scriptures doth testify, the charge of them is committed only to the priest to be disposed of,' etc. The statute then directs that the timber shall be applied to the repair of the chancel, etc. Of this statute, Lord Coke observes, that it is but a declaration of the common law, 11 Co., 49."

The herbage of a chapel-yard and the loppings of the trees therein by law belong to the incumbent. Cox v. Ricraft, 2 Lee Ecc., 373 (1757).

[56] See the Case of the Swans, 7 Co., 17 b (1592); Gillet v. Mason, 7 John., 16 (1810); 2 Bl. Com., 390.

anciently granted by the crown in virtue of its prerogative, one man had of killing and taking animals *ferœ naturæ* on the land of another; and in like manner the game, when killed or taken by virtue of the privilege, became the absolute prop- [*242] *erty of the owner of the franchise, just as in the other case it becomes the absolute property of the owner of the soil.[57]

Lord Coke states the rule thus: "But when a man hath savage beasts *ratione privilegii*, as by reason of a park, warren, etc., he hath not any property in the deer, or conies, or pheasants, or partridges; and therefore in an action, *quare parcum warrennum, etc., fregit et intrav'. 3. damas, lepores, cuniculos, phasianos, perdices, cepit et asportavit*, he shall not say *'suos,'*[58] for he hath no property in them, but they do belong to him *ratione privil'* for his game and pleasure, so long as they remain in the privileged place; for if the owner of the park dies, his heir shall have them, and not his executors or administrators, because without them the park, which is an inheritance, is not complete."[59]

It is also laid down by Lord Coke,[60] that "if a man buy divers fishes, as carps, breames, tenches, etc., and put them in

[57] Per Lord Westbury in Blades v. Higgs, 11 H. L. Cas., 621, 631 (1865); s. c., 11 Jur. (N. S.), 701; 12 L. T. (N. S.), 615, in which case it was *held*, that game found, killed and taken upon the land of A. by a trespasser, becomes the property of A. as much as if taken by A. or his servant by his authority. See, also, Sutton v. Moody, 1 Ld. Raym., 250 (1697); s. c., Comyns, 34; 12 Mod., 144; Coney's Case, Godb., 122 (1587); Churchward v. Studdy, 14 East, 249 (1811); Graham v. Ewart, 11 Exch., 326, 346 (1855); s. c., 1 H. & N., 550; 7 H. L. Cas., 331, 344; Rigg v. Lonsdale, 1 H. & N., 923 (1857); s. c., 11 Exch., 654; 2 Bl. Com., 392, *et seq.*; 2 Broom & Had. Com., *586, *et seq.*

[Under the civil law a poacher, though liable to punishment, was not required to restore his game. Hadley's Roman Law, 166.]

[58] See, however, Davies v. Powell, Willes, 48 (1737), per Willes, J.

[59] Per Lord Coke in the case of the Swans (*supra*); approved by Lord Chelmsford in Blades v. Higgs (*supra*), p. 638.

"Nor can felony be committed of them; but of those which are made tame, in which a man by his industry hath any property, felony may be committed." Case of the Swans (*supra*), Rex v. Brooks, 4 C. & P., 131 (1829). See, also, 2 Bl. Com., 343; 1 Hale, 511; East's P. C., 16, § 41; Hawk., b. 1, c. 33, §§ 26, 39; 2 B. & C., 944; T. Raym., 33; Dalton, ch. 156.

[60] Co. Lit., 8 a.

his pond, and dyeth, in this case the heire shall have them, and not the executors, but they shall goe with the inheritance; because they were at libertie, and could not be gotton without industrie, or by nets and other engines. Otherwise it is, if they were in a trunke or the like. Likewise deere in a parke, conies in a warren, and doves in a dove-house, young and old, *shall goe to the heire."[61] So, it is held, that the owner [*243] of the land upon which the tree stands, has a qualified property *ratione soli* in wild and unreclaimed bees in a bee-tree thereon.[62]

But although by the general law deer in a park, not tame and reclaimed, go to the heir-at-law of the owner of the park, yet when tame and reclaimed they become personal property and go by law to the personal representatives of the owner of them, and not to the heir of the owner of the park in which

[61] See Greye's Case, Owen, 20 (1594-5); s. c., Cro. Eliz., 372; Gouldsb., 29, pl. 24, where trespass by the heir against the executors for taking the fish with a net was *held* maintainable; 11 Vin. Abr., 166; Went. Off. Ex., 52, 53, chap. 5 (or p. 143, Am. reprint, 1832, of 14th Lond. ed.); 7 Co., 17 b; 11 Co., 50 b; Swinb., 759; Keilw., 118; 4 Leon., 240; 1 Roll. Abr., 916; Com. Dig., Biens, B, F; Bac., Executors, H 3; Shep. Touch., 469. See, also, 18 Ed. 4, p. 14; Godolph. Orph. Leg., 126; Noy's Max. (9th ed.), 230, 239; and the cases cited in the preceding notes.

[62] Gillet v. Mason, 7 John., 16 (1810); Ferguson v. Miller, 1 Cow., 243 (1823); Goff v. Kitts, 15 Wend., 550 (1836); Idal v. Jones, 2 Dev. Law, 162 (1829). See, also, Cock v. Weatherby, 13 Miss., 333 (1845); Adams v. Burton, 43 Vt., 36 (1870). [State v. Repp, 104 Iowa, 305, 306 (1898).]

[Bees and honey in a tree belong to the owner of the tree, as against a finder; nor will a local usage affect the rule. Fisher v. Steward, Smith, 60 (N. H., 1804).]

It seems more proper to say the "exclusive right of appropriation," unless the words "qualified property" are used in the same sense as at the beginning of this section. See Blades v. Higgs, there cited.

Oysters planted by an individual in a bed clearly designated and marked out in navigable waters which are common to all the inhabitants of the State, at which place no oysters were growing at the time, are the property of him who planted them, and he may maintain an action for their unlawful removal by another. Fleet v. Hegeman, 14 Wend., 42 (1835), Decker v. Fisher, 4 Barb., 592 (1848); Lowndes v. Dickerson, 34 Barb., 586 (1861). See, also, Brinckerhoff v. Starkins, 11 Barb., 248 (1851); Arnold v. Mundy, 6 N. J. Law, 1 (1821); State v. Taylor, 27 N. J. Law, 117 (1858). [See Post v. Kreischer, 103 N. Y., 110 (1886), reversing 39 Supr. Ct. (32 Hun), 49 (1884); The Swift [1901] P., 168.]

they are kept.[63] And deer in a park, though it be an ancient and legal park, may be so tame and reclaimed as to pass to the personal representatives as personal property. The question is whether they are tame and reclaimed or not, which must be determined with reference to the state and condition, nature and habits of the animals, the nature and dimensions of the place where they are kept, and the mode in which they are treated.[64]

[*244] *And in like manner if the testator had any tame pigeons, conies, pheasants, partridges, etc., they shall go to the executors; and so, though not tame, if they were taken and kept alive in any room, cage or like receptacle. So, also, it is said, as to young pigeons, though not tame, being in the dove-house and not able to fly out; yet their dams, the old ones, shall go to the heir with the dove-house.[65] Hawks reclaimed and hounds, though there are some old authorities to the contrary,[66] have also been considered to go to the executor instead of the heir.[67]

Perhaps it may properly be said that the reason of the rule that deer in a park not tame and reclaimed, fish in a pond, and other animals *feræ naturæ*, do not go to the personal representatives of the owner of the land, is, that they are not the subjects of absolute property so as to pass to the personal representatives; and they pass to the heir not by reason of his succeeding to a right of property of his ancestor in them, but by reason of his succession to the land, and the exclusive right

[63] Morgan v. Earl of Abergavenny, 8 C. B., 768 (1849). See, also, Davies v. Powell, Willes, 46 (1737); Off. Exrs. (Am. ed., 1832), 143; Law of Test., 379.

[64] Morgan v. Earl of Abergavenny (*supra*). See, also, 3 Reeve's Hist., 378.

[65] Off. Ex. (Am. ed., 1832), 143; Law of Test., 379; Bac. Abr., Executors, H 3. See, also, 2 Bl. Com., 392. The statement that young pigeons go to the executor has, however, been questioned. See Ferard Fixt., 202 note. Larceny may be committed of pigeons so tame as to come home every night to roost in wooden boxes hung on the outside of the owner's house. Rex v. Brooks, 4 C. & P., 131 (1829).

[66] Swinb., part 7, § 10; Noy's Max. (9th ed.), 144, 230, 239.

[67] Ferard Fixt., 200; Off. Ex. (Am. ed., 1832), 143; Godolph. Orph. Leg., part 2, ch. 13, and part 3, ch. 21; Bac. Abr., Executors, H 3; 1 Wms. Exrs. (6th Lond. ed.), 664.

of taking or reducing them to possession *ratione soli*.[68] But, however this may be, they are so far a part of the inheritance that waste may be committed in respect of them. Thus, if a tenant for life of a park, vivary, warren, or dove-house, kills so many of the deer, fish, game or doves, that there is not sufficient left for the stores, it is waste.[69]

It is to be remarked that the cases above referred to, where game, fish, etc., are said to go to the heir instead of to the personal representative, are cases where the ancestor had an estate of inheritance, and the question arose between the heir succeeding to the estate of his ancestor and the personal [*245] representative taking no interest in the land. But where the interest of the ancestor in the land is only a chattel interest, which passes to the personal representative on his decease, the case is different; for, in such a case, the *res principalis* passing to the personal representative would carry with it the *res accessoria*, the heir having no interest in either.[70]

[68] See Ferard Fixt., 199, note (d).

[69] 1 Cru. Dig., tit. 3, ch. 2, § 20; Vin. Abr., Waste, E; Co. Lit., 53 a. [See Robens v. Barrett, 73 Supr. Ct. (66 Hun), 189 (N. Y., 1892).]

[70] See Ferard Fixt., 201; Off. Ex., 153; Godolph. Orph. Leg., part 2, ch. 13; Harg. Co. Lit., 8 a, N. 41; 11 Vin. Abr., 166; 1 Wms. Exrs. (6th Lond. ed.), 666.

[*246] CHAPTER VIII.

EMBLEMENTS,[1] ETC.

The species of property forming the subject of this chapter, and which is often compared with fixtures, might properly have been considered in connection with the preceding chapters discussing the law of fixtures as between the same parties; but in order to avoid as far as possible scattering the subject-matter of this chapter throughout the body of the work, it has been thought advisable to present a summary view of the subject in its different relations in a distinct chapter.

Vegetable productions, as the fruit or other parts of a plant, when severed from the body of it, or the whole plant itself, when severed from the ground, are evidently personal property passing to the personal representatives.[2] And so is peat dry [*247] *or in process of curing upon a meadow.[3] But turf,

[1] The law of Emblements, etc., has been considerably changed in England by the statute of 14 & 15 Vict., ch. 25 (1851), entitled "An Act to improve the Law of Landlord and Tenant in relation to Emblements, to Growing Crops seized in Execution, and to Agricultural Fixtures," which see. See, also, Haines v. Welch, L. R. 4 C. P., 91 (1868).

[2] 1 Wms. Exrs. (6th London ed.), 668; 2 Bl. Com., 389; Johnson v. Barber, 10 Ill., 431 (1849), grass. [See, *ante*, p. *44; also Simonton v. Cornelius, 98 N. C., 433, 437 (1887).]

The rule is the same when severed by construction of law, as by a deed of the trees, grass, etc., to a third person. See *post* in this chapter, p. *270. However, in Brackett v. Goddard, 54 Me., 309 (1866), it was *held*, that hemlock timber trees cut down by the owner of the land for the purpose of removing the bark therefrom, and left with the tops on, the owner of the land intending to cut off the tops, and haul the trees off as logs to be sawed during the ensuing winter, passed by a conveyance of the land, though, as it was said in the opinion of the court, it would have been otherwise had they been cut into logs or hewed into timber. So held apparently after the analogy to the case of timber trees blown down or severed by a stranger. [See *post*, p. *305.]

[3] Giles v. Stevens, 13 Gray, 146 (1859).

gravel and chalk unsevered are part of the freehold.[4] And so are fruit or other trees standing and growing on the land,[5] and the fruit or produce of them, while unsevered; and hence on the death of the owner of the land they go with the land to the heir and not to the executor or administrator.[6] Among the fruits, etc., that if hanging on the trees at the time of the death of the ancestor, will go to the heir and not to the personal representative, may be mentioned apples, pears, nuts, etc., and other natural fruits, or *fructus naturales* as distinguished from

[4] Amiles (or Amiers) v. Chambers, 1 Mod., 35 (1681); s. c., 2 Keb., 596. [Burns v. Fleming (1880), 8 Sess. Cas., 4th Ser., 226.] See, also, Stoutfil's Case, 2 Mod., 77 (1688); March, 58, pl. 89.

[The rules as to emblements are not applicable to ice. Higgins v. Kusterer, 41 Mich., 318 (1879).]

[5] Adams v. Smith, Breese, 221 (1828); Bank of Lansingburg v. Crary, 1 Barb., 542 (1847); Liford's Case, 11 Co., 48 a (1614); 2 Bl. Com., 123; Com. Dig., Biens, H; Bac. Abr., Exrs., H 3. [Asher Lumber Co. v. Cornett, 23 Ky. Law R., 602, 603 (1901); Emerson v. Shores, 95 Me., 237, 239 (1901); Donworth v. Sawyer, 94 Me., 242 (1900); *Re* Ainslie (1885), 30 Ch. D., 485.]

[6] Liford's Case, 11 Co., 48 a (1614); Com. Dig., Biens, H; Swinb., pt. 7, § 10, pl. 8; Bac. Abr., Exrs., H 3.

As to the particular interest of a lessee in the trees on the demised premises, see Liford's Case (*supra*); Channon v. Patch, 5 B. & C., 897 (1826); Berry v. Heard, Cro. Car., 242 (1622).

As to his interest in the hedges and bushes cut upon the premises, see Berriman v. Peacock, 9 Bing., 384 (1832).

Crude turpentine which has formed on the body of the tree and is usually known as "scrape," being that portion which does not run into the box and which is removed after it has formed in sufficient quantities, by scraping it from the tree, is personal property and belongs to the person who has lawfully produced it by cultivation. It is an annual product of labor and industry, and although it adheres to the body of the tree, it is not a part of the realty. The turpentine crop may be properly classed with *fructus industriales*, for it is not the spontaneous product of trees, but requires annual labor and cultivation. Lewis v. McNatt, 65 N. C., 63 (1871). So, also, as to turpentine in boxes, in a state to be dipped up. Branch v. Morrison, 5 Jones' Law, 16 (1857); s. c., 6 Id., 16.

In Purner v. Piercy, 40 Md., 212 (1874), the opinion is expressed (*obiter*), "that a growing crop of peaches or other fruit requiring periodical expense, industry and attention in its yield and production, may well be classed as *fructus industriales*, and not subject to the 4th section of the Statute" of Frauds.

fructus industriales.[7] So as to grass growing upon the land at [*248] the time of *the death of the ancestor, even if sown from the seed and though fit to be mowed down for hay.[8] And so as to hedges, bushes, etc., for these are said to be the natural or permanent profit of the earth, and are reputed parcel of the ground whereon they grow.[9]

Where, however, growing timber trees, etc., are severed from the soil either actually or by construction of law, as where a tenant in fee simple legally grants away the trees without the land, or sells the land reserving the trees from the sale, the trees being legally separated from the land are, though in fact united to it, personal property and go to the personal representative.[10]

[7] Bac. Abr., H 3; Off. Ex. (Am. ed., 1832), 145; Craddock v. Riddlesbarger, 2 Dana, 205 (1834); Swinb., pt. 7, § 10; Godolph., 122; Flud v. Flud, Freem. Ch., 210 (1696); Kain v. Fisher, 6 N. Y., 597 (1852). [See Sparrow v. Pond, 49 Minn., 412 (1892).]

It seems that not only natural fruits, but all growing fruits, though produced by skill and culture, go to the heir. See Ferard Fixt., 207, note. Swinb., pt. 7, § 10.

[8] Bac. Abr., Exrs. H 3; Godolph., 122; Off. Ex., 145; Kain v. Fisher (*supra*); Bank of Lansingburg v. Crary (*supra*); 1 Wms. Exrs. (6th Lond. ed.), 672. [Evans v. Hardy, 76 Ind., 527, 532 (1881); Evans v. Iglehart, 6 Md., 171, 188 (1834); Reiff v. Reiff, 64 Pa. St., 134 (1870); see, also, Rogers v. Elliott, 59 N. H., 201, 202 (1879).]

[Growing grass belongs to the devisee of the land. *Re* Chamberlain, 140 N. Y., 390, 392 (1893).]

An opinion has been expressed, however, that the artificial grasses, such as clover, saint-foin, and the like, by reason of the greater care and labor necessary for their production, are within the rule of emblements. See 1 Wms. Exrs. (6th Lond. ed.), 672; 4 Burn's Eccl. Law (9th ed.), 410; Graves v. Weld, 5 B. & Ad., 105 (1833). [See, also, McNee v. Carnie (1866), Guthrie's Sel. Cas., 345, 346.]

[Alfalfa is a perennial plant which, when properly cared for, produces annual crops of hay or pasturage for a indefinite number of years, and can not be regarded as a "growing crop." Miller v. County of Kern, 137 Cal., 516 (1902).]

[9] 1 Wms. Exrs. (6th Lond. ed.), 668. [Kirchman v. Lapp, 19 N. Y. Supp., 831, 832 (1892); *Re* Ainslie (1884), 28 Ch. D., 89, 92; (1885) 30 Ch. D., 485.]

[10] Stukeley v. Butler, Hob., 173 (1615); Off. Ex. (14th ed.), 148; Com. Dig., Biens, H; 1 Wms. Ex'rs. (6th Lond. ed.), 668, and cases cited. See, also, Liford's Case, 11 Co., 50 a (1614). [See, *post*, p. *270.]

There are, however, certain other vegetable products of the earth, which although they are annexed to and growing upon the land at the time of the occupier's death, or at the time of the termination of his estate in the land, yet, as between the personal representatives of the person seized of the inheritance and the heir, and between the personal representatives of the tenant for life and the remainderman or reversioner, and between an ordinary landlord and tenant, are in some cases considered as chattels and pass or are removable as such.[11] These are usually called emblements,[12] and consist of those vegetable *products of the earth, as corn, etc., which are produced [*249] annually by labor, industry, and manurance, and are called *fructus industriales*, as distinguished from those spontaneous or natural products which are called *fructus naturales*. Crops of the former nature (viz. *fructus industriales*), sown or planted by the owner of the inheritance, on his death before the same are harvested, go to the executor and not to the heir, as a compensation, as it is said, for the labor and expense of tilling,

[11] Emblements seem in most respects to be considered as chattels, and are in this respect to be distinguished from fixtures which during annexation are in many, if not most, respects to be considered as realty. See this subject more fully considered *post*, in this chapter.

[Until actual severance, crops, like fixtures, are real property, as has been held whenever the point is directly raised. See Bagley v. Columbus R'y Co., 98 Ga., 626 (1896), where the opinion of the court, written by Simmons, C. J., is excellent and exhaustive. However, they very frequently have the incidents of personal property. As Chief Justice Simmons, at p. 632, says: "A growing crop is a sort of legal chameleon constantly changing color to meet the emergency of each particular class of cases in which the question arises whether it is to be considered as personalty or as realty." In this opinion, p. 639, the distinction between growing crops and emblements is pointed out. It is to be regretted that courts frequently speak of growing crops as personal property when it is simply meant that the rules which govern personal property are to be applied in that particular case. See Fish v. Capwell, 18 R. I., 667, 672 (1894).]

[Growing crops are often considered personal property. Favorite v. Deardorff, 84 Ind., 555, 557 (1881).]

[As between landlord and tenant, the annual crop constitutes no part of the freehold. Perry v. Hamilton, 138 Ind., 271, 273 (1894).]

[12] 1 Wms. Exrs. (6th Lond. ed.), 670.

manuring and sowing the land.[13] It seems, however, that the better reason of the rule, as between executor and heir of the tenant in fee, is, as expressed by Swinburne,[14] that the seed has been "sowne in the ground by man's industry in hope not to continue there still, but to be separated and reaped with increase ere long;" and "that these industrial fruits were, in the purpose and intention of the deceased, separable and movable, even when the will was first made, albeit they were not actually separated or removed from the ground; which purpose and intention or destination is sufficient in a testament to make them movable," reasons which seem to make this branch of the law harmonize with what has hereinbefore been attempted to be shown to be the controlling element in determining the question of the removability of ordinary fixtures. However, the reason first above stated, to which may be added the ground of encouragement of husbandry and the public benefit, seems applicable to relations other than that of executor and heir of tenant in fee.[15] And in the case of tenancies for life, the estate being determined by the act of God, the maxim "*Actus Dei nemini facit injuriam*" furnishes an additional and strong ground for the adoption of the rule in question.

The doctrine of emblements extends not only to corn and grain of all kinds, though growing, but also to everything else of that kind which is produced annually by labor, cultivation and manurance;[16] as saffron, flax, hemp, and the [*250] *like;[17] and melons of all kinds.[18] The doctrine is considered also to include hops, though not sown, and though

[13] See McCormick v. McCormick, 40 Miss., 760 (1866); 1 Wms. Exrs., 671 and authorities cited. [See, *post*, p. *252; and Sparrow v. Pond, 49 Minn., 412, 417 (1892).]

[14] Part 7, § 10.

[15] 2 Bl. Com., 122. [Chappell v. Boyd, 56 Ga., 578, 582 (1876).]

[16] Bac. Abr., Executors, H 3; Off. Ex., 147; Co. Lit., 55 b; 1 Wms. Exrs. (6th Lond. ed.), 671; Lewis v. McNatt, 65 N. C., 63 (1871). See this case, stated *ante*, p. *247 note.

[17] Bac. Abr., Exrs., H 3; Off. Ex. (14th ed.), 147; 1 Wms. Exrs. (6th Lond. ed.), 671; Co. Lit., 55 b.

[18] Off. Ex. (14th ed.), 153. The opinion is here expressed that artichokes go to the heir, as not having such yearly setting and manurance as to sever them from the soil. *Sed quaere.* See 1 Wms. Exrs. (6th Lond. ed.), 671 n.

springing from ancient roots, as they are grown by manurance and industry of the owner.[19] So also it includes potatoes.[20]

But, if a man sows acorns, or plants young fruit or other trees, these would not be considered emblements, because they yield no present annual profit.[21] The doctrine of emblements

[19] Co. Lit., 55 b, note (1); Off. Ex. (14th ed.), 147; 1 Wms. Exrs. (6th Lond. ed.), 671; Latham v. Atwood, Cro. Car., 515 (1636); Flud v. Flud, Freem. Ch., 210 (1696). In Fox v. Brissae, 15 Cal., 223 (1860), grape vines planted by a tenant for sale, and growing in a nursery, were considered as sustaining the same relation to the freehold as crops of grain, and a recovery was had therefor in trespass by the tenant against the landlord, who had entered and forcibly ejected the tenant (there being no clause of re-entry in the lease), and refused the tenant permission to gather and remove his crops and grape vines. See, also, Wintermute v. Light, 46 Barb., 278 (1866), relating to wine plants.

[Sugar-cane is subject to the law of emblements, although it is not sown and may require more than a year to mature, as it is the result of annual care and labor. Nawahi v. Hakalau Plantation Co., 14 Hawaii, 460, 461 (1902).]

[20] Per Bailey, J., in Evans v. Roberts, 5 B. & C., 832 (1826). [Salimonie Mining Co. v. Wagner, 2 Ind. App., 81, 83 (1891).]

The opinion is expressed in Wentworth's Office of an Executor (14th ed., p. 152), that the roots of carrots, parsnips, turnips, skerrets, and such like, arising from yearly sowing, go to the heir and not to the executor, for the reason that the executor cannot get them without breaking the soil. The same opinion is expressed in Godolphin, pt. 2, ch. 14, sec. 1. But no good reason is seen for the distinction, and it probably is not now the law. See 1 Wms. Exrs. (6th Lond. ed.), 671, note; Co. Lit., 55 b; 2 Bl. Com., 123; Dunne v. Ferguson, Hayes, 540 (1832).

[21] See Co. Lit., 55 b; Com. Dig. Biens, G 1, H; 2 Bl. Com., 123. These authorities relate to lessor and lessee, but on familiar principles must be applicable also to the relations of executor and heir, tenant for life and remainderman, etc. Whether trees, shrubs, etc., set out by nurserymen, and gardeners (the owners of the land), for the purposes of sale, may, as between the heir and executor of tenant in fee, be removed by the latter, appears not to have been decided; though, as has been already stated (*ante* p. *107), as between landlord and tenant, they are removable by the latter during his term, but rather as being analogous to trade fixtures than emblements. On principle and analogy to the doctrine of fixtures proper, they would probably be held to go to the heir with the inheritance. They have been held to pass by a conveyance or mortgage of the land, in which cases the rule (when not affected by the particular terms of the instrument) is the same as between executor and heir. Smith v. Price, 39 Ill., 28 (1865); Price v. Brayton, 19 Iowa, 309 (1865); Maples v. Millon, 31 Conn., 298 (1863). [Dubois v. Bowles, 30 Colo., 44,

[*251] extends *to a crop of that species only which ordinarily repays the labor by which it is produced, within the year in which that labor is bestowed, though the crop may in extraordinary seasons be delayed beyond that period;[22] and the doctrine extends to no more than a single crop, though the effect of the labor and manurance may continue for several crops.[23]

The cases do not seem to lay down any different degrees of

61 (1902); see, also, Wallace v. Dodd, 136 Cal., 210 (1902); Holmberg v. Johnson, 45 Kan., 197 (1891). But see Batterman v. Albright, 122 N. Y., 484 (1890).]

[Nursery stock passes to the mortgagee of the land as against a subsequent chattel mortgagee. While the owner might sell, at the proper season, in the ordinary course of trade, such of the stock as was suitable for transplanting, and the mortgagee of the land could not reclaim it, it is otherwise as to a sale of or giving a chattel mortgage on the entire stock without actual severance, and without regard to its being in proper condition for transplanting. Adams v. Beadle, 47 Iowa, 439 (1877).]

[The word "crop," taken in its most comprehensive sense, includes fruits grown upon trees, but the trees themselves are not included in that term, and, as such, are not exempt from taxation. Cottle v. Spitzer, 65 Cal., 456, 458 (1884.) See, as to blackberries, Sparrow v. Pond, 49 Minn., 412 (1892).]

[In Mason v. Lemmon, 4 Ohio Dec., 322, 323 (1895), it is said that grape crops, requiring cultivation, are emblements.]

[22] Graves v. Weld, 5 B. & Ad., 105, 118 (1833). In this case the tenant for a term determinable upon a life sowed the land in the spring first with barley and soon after with clover. The life expired in the following summer. In the autumn the tenant mowed the barley, together with a little of the clover plant which had sprung up. The clover so taken made the barley straw more valuable by being mixed with it; but the increase of the value did not compensate for the expense of cultivating the clover, and a farmer would not be repaid such expense in the autumn of the year in which it was sown. The reversioner came into possession in the winter and took two crops of the same clover after more than a year had elapsed from the sowing. *Held*, that the tenant was not entitled to emblements of either of these two crops; first, because emblements can be claimed in a crop of that species only, etc. (as above stated); and secondly, because, even if the plaintiff were entitled to one crop of the vegetable growing at the time of the *cesser* of his interest, this had been already taken by him at the time of cutting the barley. The case of Kingsbury v. Collins, 4 Bing., 202 (1827), holding teazles to be emblements, was in Graves v. Weld (*supra*), commented upon and explained; and that case was not considered an authority to show that things taking more than a year to arrive at maturity could be emblements.

[23] Graves v. Weld (*supra*).

liberalty in the application of the law of emblements (properly so called), to the different relations of landlord and tenant, tenant for life and remainderman or reversioner, etc., such as have been shown to exist with reference to fixtures. The reason seems to be that the doctrine of emblements in these different relations is founded upon substantially the same grounds; it being from the nature of the subject-matter absurd and contradictory to suppose that crops which are in all the relations "sown in the ground by man's industry in hope not to continue there still, but to be separated and reaped with increase ere long," are intended to be a permanent accession to the *realty. Accordingly, as will be seen hereafter, emble- [*252] ments are for most purposes considered as chattels.

There are, however, some rules of the law of emblements, to be referred to presently, which, though seemingly well settled, seem anomalous and difficult of explanation. Where the deceased was seized in fee simple of the land, his personal representatives are entitled to emblements as against the heir,[24] and the same rule applies to tenant in tail.[25] It is, however, well settled that, if a man seized in fee sows the land, and then without reservation conveys it away before the crop is severed, the crop passes with the land as appertaining to it, and does not belong either to the grantor, or to his executor in case he dies before the severance.[26] And the same rule is ap-

[24] Co. Lit., 55 b, note (2); Com. Dig., Biens, G 2; 1 Wms. Exrs. (6th Lond. ed.), 673. Bac. Abr., Executors, H 3. [See, *ante*, p. *249. Mitcham v. Moore, 73 Ala., 542, 547 (1883); McGee v. Walker, 106 Mich., 521, 522 (1895); Kupp's Est., 2 Woodward, 228, 230 (Pa., 1868); see, also, Walker v. State, 111 Ala., 29, 31 (1895); Marx v. Nelms, 95 Ala., 304 (1891); Kidwell v. Kidwell, 84 Ind., 224, 227 (1882).

By §§ 2439-41 of the Alabama Code it is the duty of an administrator to cultivate and market the crop. Tayloe v. Bush, 75 Ala., 432, 437 (1883); but such crop will go to the heir if the personal representative does not exercise his option. Wright v. Watson, 96 Ala., 536, 539 (1892). This matter is also regulated by statute in Rhode Island. See Draper v. Barnes, 12 R. I., 156, 158 (1878).]

[25] Com. Dig., Biens, G 2; Off. Ex. (14th ed.), 145.

[26] Powell v. Rich, 41 Ill., 466 (1866); Tripp v. Haseeig, 20 Mich., 254 (1870); Backenstoss v. Stahler, 33 Penn. St., 254 (1859); Terhune v. Elberson, 3 N. J. Law (2 Penning.), 3d. ed., p. 297; 2d. ed., 553; 1st. ed., p. 726 (1810); Gibbons v. Dillingham, 10 Ark., 9 (1849); Bull v. Griswold, 19 Ill., 631 (1858); Talbot v. Hill, 68 Ill., 106 (1873); Bludworth v.

Hunter, 9 Rob. (La.), 256 (1844); Civil Code, La., Art. 456. See, also, Burnside v. Weightman, 2 W. & S., 268 (1841). [Miller v. Cheney, 88 Ind., 466, 470 (1882); Blodgett v. German Sav. Bank, 69 Ind., 153, 156 (1879); Ellithorpe v. Reidesil, 71 Iowa, 315, 318 (1887); Chapman v. Veach, 32 Kan., 167, 170 (1884); Baird v. Brown, 28 La. Ann., 842, 843 (1876); Coman v. Thompson, 47 Mich., 22 (1881); Reed v. Swan, 133 Mo., 100, 106 (1895); Steele v. Farber, 37 Mo., 71, 79 (1865); Coor v. Smith, 101 N. C., 261, 262 (1888); see, also, Graham v. Roark, 23 Ark., 19, 23 (1861); Abbott v. Abbott, 75 Pac., 1040 (Kan., 1904); Mueller v. Olson, 90 Minn., 416, 417 (1903); Mitchell v. Tschida, 71 Minn., 133, 135 (1898); Marshall v. Homer, 74 Pac., 368, 370 (Okla., 1903).]

[The rule is the same upon partition of land owned in common, the crops planted by one co-tenant, growing upon each portion assigned in severalty to the co-tenants, going with the land as a part thereof. Calhoun v. Curtis, 45 Mass., 413, 415 (1842); see Bird v. Bird, 15 Fla., 424, 443 (1875); and where the crops have been planted by one tenant in common in exclusive possession, his co-tenant, after filing a bill for partition, may be permitted to share the proceeds. Moreland v. Strong, 115 Mich., 211, 217 (1897).]

[Where a transfer of land is void for want of writing, the crop thereon does not pass. Jackson v. Evans, 44 Mich., 510, 513 (1880).]

[In Voils v. Battin, 6 Kan. App., 742 (1897), it was held that a crop, previously sold on execution, did not pass on a sale of the land.]

[Where an owner of land mortgages it, and afterwards makes a chattel mortgage on the crops, the mortgagee of the land, by purchasing the land, merges his mortgage so that the chattel mortgage becomes prior to the claim of the grantee and of his tenant. Cameron v. Gibson, 17 Ont., 233 (1889).]

[A lessee, on taking possession under his lease, is entitled to the crops growing upon the leased premises. Edwards v. Perkins, 7 Oregon, 149, 156 (1879); Emery v. Fugina, 68 Wis., 505, 507 (1887).]

The cases of Stambaugh v. Yates, 2 Rawle, 161 (1828); Smith v. Johnston, 1 Penn., 471 (1830); s. c., 3 Penn., 496, so far as they decide that growing grain does not pass by a conveyance of the fee, where not specially reserved, are now overruled. See Bank of Penn. v. Wise, 3 Watts, 394, 406 (1834); Wilkins v. Vashbinder, 7 Watts, 378 (1838); Cobel v. Cobel, 8 Penn. St., 346 (1848); Burnside v. Weightman, 9 Watts, 46 (1839); Bittenger v. Baker, 29 Penn. St., 68 (1857).

As to whether such reservation of the crops may be made by parol or not there is a conflict among the authorities. If the rule in the text be conceded to be settled, the weight of authority seems to be that such a parol reservation is void. Gibbons v. Dillingham, 10 Ark., 9 (1849); Vanderkarr v. Thompson, 19 Mich., 82 (1869); Austin v. Sawyer, 9 Cow. 39 (1828); Powell v. Rich, 41 Ill., 466 (1866); Brown v. Thurston, 56 Me., 126 (1868); McIlvaine v. Harris, 20 Mo., 457 (1855); Chapman v. Long, 10 Ind., 465 (1858). See, also, Wintermute v. Light, 46 Barb., 278 (1866); Carpenter v. Jones, 63 Ill., 517 (1872); Smith v. Price, 39

*plicable when the land on which such crop is growing [*253] is sold and conveyed on execution against its owner.[1] So, the purchaser of mortgaged premises upon a foreclosure and sale thereof is entitled to the growing crops or emblements thereon

Ill., 28 (1865); Johnson v. Tantlinger, 31 Iowa, 500, 502 (1871); Conner v. Coffin, 22 N. H., 538 (1851); Ring v. Billings, 51 Ill., 475 (1869). [Johnston v. Smith, 70 Ala., 108, 120 (1881); Gam v. Cordrey, 53 Atl., 334, 335 (Del., 1902); Damery v. Ferguson, 48 Ill. App., 224, 228 (1898); Garanflo v. Cooley, 33 Kan., 137, 139 (1885); Chapman v. Veach, 32 Kan., 167, 170 (1884); Kammrath v. Kidd, 95 N. W., 213 (Minn., 1903); Bloom v. Welsh, 27 N. J. Law, 177 (1858). A growing crop is a part of the realty as between the mortgagor and the mortgagee, and the mortgagor can not assert the rights of third persons. Williamson v. Richardson, 31 La. Ann., 686, 687 (1879). Notice by the sheriff at an execution sale of land can not affect the right of the purchaser as to crops growing thereon. Frost v. Render, 65 Ga., 15, 19 (1880). A written agreement reserving a growing crop to the grantor, is merged into a subsequent, unconditional deed, and the grantee is entitled to such crop. Turner v. Cool, 23 Ind., 56 (1864). See, also, Clifton v. Jackson Iron Co., 74 Mich., 183 (1889), for the same rule as to trees.]

See, *contra*, Flynt v. Conrad, Phill. Law, 190 (1867); Heavilon v. Heavilon, 29 Ind., 509 (1868); Baker v. Jordan, 3 Ohio St., 438 (1854); Youmans v. Caldwell, 4 Ohio St., 71 (1854); Backenstoss v. Stahler, 33 Penn. St., 251 (1859). See, also, Harbold v. Kuster, 44 Penn. St., 394 (1863); Lauchner v. Rex, 20 Penn. St., 464 (1853); Pea v. Pea, 35 Ind., 387 (1871); Jones v. Timmons, 21 Ohio St., 596 (1871), where a distinction is taken between crops and trees. See, however, Carpenter v. Ottley, 2 Lans., 451 (1870). [A parol reservation is held valid in Harvey v. Million, 67 Ind., 90 (1879), overruling earlier cases; Kluse v. Sparks, 10 Ind. App., 444, 446 (1894); Hubbs v. Swabacker, 51 W. Va., 438 (1902); and such parol reservation is valid though a sale of a growing crop is within the statute of frauds. Kerr v. Hill, 27 W. Va., 576 (1886). See, also, Moffett v. Armstrong, 40 Iowa, 484 (1875); Creager v. Creager, 87 Ky., 449, 453 (1888); Weldon v. Lytle, 53 Mich., 1 (1884); Banta v. Merchant, 45 App. Div., 141 (N. Y., 1899). A lessor can, by parol, reserve a growing crop. Hisey v. Troutman, 84 Ind., 115 (1882).]

But where "A. is bound in an obligation that B. shall enjoy a lease of black acre immediately after his death [and], the land being sown, the executors of A. take the corn, it was holden the obligation was not forfeited, for that, by the law, the corn did belong to the executors." Launton's Case, 4 Leon., 1 (1578). [See, *post*, p. *258.]

[1] Bear v. Bitzer, 16 Penn. St., 175 (1851); Pitts v. Hendrix, 6 Geo., 452 (1849). [Thweat v. Stamps, 67 Ala., 96, 98 (1880); see, also, King v. Bosserman, 8 Pa. Dist., 344 (1899); Loose v. Scharff, 6 Pa. Super., 153 (1897). But see Kesler v. Cornelison, 98 N. C., 383, 385 (1887).]

[For the same rule as to fixtures, see, *post*, p. *276. The rule stated

in the text applies as against a buyer of the crops, who has not removed them, although the grantee had notice. Bloom v. Welsh, 27 N. J. Law, 177 (1858); and as against a cropper. Adams v. McKesson, 53 Pa. St., 81 (1866); also a lessee. Sallade v. James, 6 Pa. St., 144, 145 (1847).]

[One whose land has been sold on execution and whose right must expire at the end of a year from the sale, unless he redeems, is not entitled to emblements. "It may be said that he intended to redeem, and was prevented by unforeseen and uncontrollable causes; but the law can not enquire into the good faith of such a pretense. The party in such situation must know, or at least make his own estimate, of his ability to redeem, and if he chooses to put out crops which he may not reap within the year given him to redeem, without securing by agreement with the purchaser of the land the rights of a tenant after the expiration of the year, he must suffer the consequences." Thomas v. Noel, 81 Ind., 382. 383 (1882).]

[The purchaser at an execution sale who takes possession of the land is entitled to a crop afterwards planted by the defendant with the knowledge and consent of such purchaser. Smith v. Hague, 25 Kan., 246 (1881).]

[A levy upon land includes a crop growing thereon. Frost v. Render 65 Ga., 15, 19 (1880).]

[Where land upon which crops are growing is seized, and such crops are gathered by the seizing creditor through the sheriff, and stored, and a subsequent seizure by the same creditor, upon a second installment of the same debt, is made, such crops remain subject to the second seizure. Townsend v. Payne, 42 La. Ann., 909, 914.]

[An officer selling land under a decree has no authority to reserve growing crops. Johnston v. Smith, 70 Ala., 108, 120 (1881).]

[The purchaser of land at an execution sale has no right to the crops growing thereon until he obtains possession. Potter v. Lambie, 142 Pa. St., 535, 538 (1891).]

[Where the purchaser at an execution sale leaves the judgment-debtor in possession as tenant at will, such tenant is entitled to the crops growing at the time the sheriff's deed is given. Martin v. Knapp, 57 Iowa, 336, 341 (1881).]

[Where there has been a constructive severance by the purchaser's apparently acquiescing in an exemption of the growing crops as personal property by the defendant, and an appraisement thereof as such, the purchaser of the land is not entitled to them. Hershey v. Metzger, 90 Pa. St., 217 (1879).]

[Where a judgment is a lien upon land, a crop grown thereon can be sold, when matured, under the *fi. fa.* issued upon the judgment, as against junior liens. And the lien attaches to the crop as against a chattel mortgagee. Clark v. Wheaton, 62 Ga., 173, 174 (1878). But where a lease is made subsequent to a judgment against the lessor, a purchaser of the land at an execution sale afterwards made, acquires only the interest of the lessor as to the growing crop. Blitch v. Lee, 115 Ga., 112 (1902); Dollar v. Roddenbery, 97 Ga., 148 (1895); Heavilon v. Farmers

Bank, 81 Ind., 249 (1881). In the latter case it is said that the tenant's right grows out of the uncertainty when, if ever, a sale of the land will be made, it not having been ordered nor advertised at the time he hires the land, and where the tenancy is uncertain, he who sows shall reap. See, to the same effect, Johnson v. Cook, 96 Mo. App., 442 (1902). In McKeeby v. Webster, 170 Pa. St., 624 (1895), where the tenant paid rent in full at the time of making the lease, a purchaser of the land at a subsequent execution sale could not deprive him of his right to the crop.]

[Where one having a sheriff's deed allows the tenant to remain until the latter harvests the crop, he is estopped to claim the grain. Bowen v. Roach, 78 Ind., 361 (1881).]

[That lien does not cover tenant's fixtures, see, *post*, p. *288.]

[Where delinquent taxes are a lien upon land, they are a lien upon crops growing upon the land. Blodgett v. German Sav. Bank, 69 Ind., 153, 156 (1879). But the holder of a tax-deed, not in possession, is not entitled to growing crops, but has a right, after recovery in ejectment, to damages for the profits. Brock v. Leighton, 11 Ill. App. 361, 364 (1882).]

[A purchaser of land takes subject to an agricultural lien on crops, given by a tenant. Dail v. Freeman, 92 N. C., 351 (1885).]

Under the system of appraisement of land for judicial sales in Ohio, by which the land is appraised and not sold except at a price bearing a fixed proportion to the appraised value, the value of the annual crops is not included in the estimate, and the debtor's rights can only be protected by regarding such crops as personalty requiring a separate levy; and hence growing crops do not there pass to the purchaser at a judicial sale of the land. Cassilly v. Rhodes, 12 Ohio, 88 (1843), a sale under a decree of foreclosure; Houts v. Showalter, 10 Ohio St., 126 (1859), holding the same rule applicable to a sale by a sheriff under proceedings in partition. The rule last stated is founded on reasons peculiar to the policy of this State as to judicial sales which can only be made for two-thirds of the appraised value in which the crops are not included; and the rule itself is conceded in the case last cited to be opposed to the current of authority elsewhere where real estate is sold without appraisement and for whatever it will bring. [This rule applies to the landlord's share of a crop put in by a tenant, the purchaser at a judicial sale acquiring no title thereto, this being an exception to the general rule that a purchaser is entitled to rent which becomes due after title vests in him. Albin v. Riegel, 40 Ohio St., 339, 340 (1883). Grape crops, requiring annual cultivation, are emblements, which do not pass to the purchaser of the land at judicial sale. Mason v. Lemmon, 4 Ohio Dec., 322, 324 (1895).]

In Walton v. Jones, 65 N. C., 170 (1871), where an execution was levied upon land in 1861, the lien of which was continued by successive writs of *venditioni exponas* until the fall of 1867, when the land was sold by the sheriff, it was *held*, that the legal presumption that the crops of 1867 passed with the land was fully rebutted; "for they were not included in the levy of 1861 and of course did not pass by the sale." This conclusion seems very like begging the question.

at the time of the sale as against the mortgagor or his assignee in bankruptcy.[2] Also, as against his lessee subsequent to the

[2] Aldrich v. Reynolds, 1 Barb. Ch., 613 (1840); Lane v. King, 8 Wend., 584 (1832); Crews v. Pendleton, 1 Leigh, 297 (1829); Gillett v. Balcom, 6 Barb., 370 (1849); Bittenger v. Baker, 29 Penn. St., 68 (1857). [Ho Sun v. Hitchcock, 9 Hawaii, 616, 619 (1894); Harmon v. Fisher, 9 Ill. App., 22, 24 (1881); Martin v. Knapp, 57 Iowa, 336, 344 (1881); Missouri Val. Ins. Co. v. Kiehl, 25 Kan., 390 (1881); Porter v. Hubbard, 134 Mass., 233, 236 (1883); Dayton v. Dakin, 103 Mich., 65, 73 (1894); Scriven v. Moote, 36 Mich., 64, 66 (1877); Hayden v. Burkemper, 101 Mo., 644, 647 (1890), aff'g 40 Mo. App., 346 (1890); Wallace v. Cherry, 32 Mo. App., 436, 438 (1888); Jones v. Adams, 37 Oregon, 473, 476 (1900); McDowall v. Phippen, 1 Ont., 143, 145 (1881). But see McAllister v. Lawler, 32 Mo. App., 91 (1888).]

[The rule stated in the text also applies to vendor's liens. Johnston v. Smith, 70 Ala., 108, 120 (1881); Siefert v. Campbell, 24 Ky. Law R., 1050 (1902).]

[A person in possession of land under a bond for a deed, who fails to perform his contract, is not entitled to crops sown after commencement of a suit to foreclose the bond. Sievers v. Brown, 34 Ore., 454, 461 (1899).]

[A mortgagee, purchasing at the foreclosure sale, is entitled to the growing crops, although, by a previous written agreement with the mortgagor, he has bought such crops with the understanding that he is to reduce debts of the mortgagor to him. Otherwise, no reservation having been made at the sale, there would be no equality between the mortgagee, who has the right to bid, and other bidders. Ledyard v. Phillips, 47 Mich., 305 (1882).]

But where the owner of the land executed a mortgage thereon which was foreclosed in equity, and a sale had thereunder, and pending the suit for foreclosure, the mortgagor demised the land to a third person, who raised a crop of wheat and oats thereon which he harvested and placed in shock before the agent of the purchaser was put in possession of the land, and after he had harvested the crop and before the time of redemption from the sale had expired and the master's deed been executed, an agent of the purchaser under the foreclosure was put in possession under a writ issued for the purpose, and threshed and hauled away the grain, it was *held*, that the crop so grown and harvested did not pass to the purchaser but belonged to the tenant. Johnson v. Camp, 51 Ill., 219 (1869). The report of this case does not state whether the grain was harvested before or after the sale. Walker, J., in delivering the opinion of the court, observed that defendant knew, "that he [the tenant] had leased the ground from the owner, and that he [the defendant] himself had no title to the premises until he purchased and acquired his deed. He knew that he was not entitled to the land or its possession until after the redemption had expired, and he acquired the master's deed; and he knew that he could only acquire possession by a writ which the decree

*giving of the mortgage.[1] So, also, as against one who [*254] had prior to the foreclosure purchased such growing crops at a

directed to be issued; and he should have known that he only thus acquired the possession of the land and fixtures, but no right to personal property on the land.'' [As to ice cut and removed, see Gregory v. Rosenkrans, 72 Wis., 220 (1888).]

[A court may order a sale of the growing crops apart from the land, and can set aside a sale of such crops. Peckham v. Group, 3 Kan. App., 369 (1895).]

[Where the purchaser at a foreclosure sale leaves the mortgagor in possession awaiting a decision of the supreme court on an appeal, and the mortgagor sows a crop, he is entitled to emblements. Dobbins v. Lusch, 53 Iowa, 304, 309 (1880).]

[A mortgagee can not recover crops raised by the mortgagor which are severed before entry by the mortgagee. Hinton v. Walston, 115 N. C., 7, 8 (1894).]

[In Wisconsin the mortgagor is entitled to cut mature crops after a sale of the land at foreclosure sale and before confirmation of such sale. Allen v. Elderkin, 62 Wis., 627 (1885).]

[The right of a purchaser at a foreclosure sale to growing crops does not begin until the execution of the sheriff's deed after the expiration of the time for redemption. Everingham v. Braden, 58 Iowa, 133, 134 (1882); White v. Griggs, 54 Iowa, 650, 651 (1880).]

[Where a mortgagee enters under an ineffectual foreclosure, and, in good faith, sows and harvests a crop with the knowledge of and without objection from the mortgagor, he at least would be entitled to it as a mortgagee in possession, and would not be a trespasser though accountable for the profits. Holton v. Bowman, 32 Minn., 191, 192 (1884).]

[Upon redemption from an execution-sale, the purchaser is entitled to emblements. Gardner v. Lanford, 86 Ala., 508 (1888).]

[If the mortgagor redeems he is entitled to the crops growing upon the land at the time of the foreclosure sale. Cartwright v. Savage, 5 Ore., 397 (1875).]

However, the mortgagor cannot prolong his possession by sowing on his own account crops which may not mature till after the confirmation of the sale and conveyance of the legal title. Thus, where a mortgagor after the sale of the mortgaged premises by the sheriff but before the confirmation of such sale by the court, without authority or consent of the purchaser sows wheat on the premises, such crop cannot after confirmation be harvested by him. Parker v. Storts, 15 Ohio St., 351 (1864).

The rule on the subject of judicial sales of land in Ohio as relating to crops thereon, has already been shown to be peculiar. See *ante*, p. *253, note.

[1] Lane v. King, 8 Wend., 584 (1832); Jones v. Thomas, 8 Blackf., 428 (1847). [Stanbrough v. Cook, 83 Iowa, 705 (1891); Downard v. Groff, 40 Iowa, 597, 598 (1875); Missouri Valley Co. v. Barwick, 50 Kan., 57, 60

(1892); Goodwin v. Smith, 49 Kan., 351, 355 (1892); Rardin v. Baldwin, 9 Kan. App., 516, 518 (1900); Skilton v. Harrel, 5 Kan. App., 753 (1897); Shockey v. Johontz, 2 Kan. App., 483 (1896); Ruggles v. First Nat. Bank, 43 Mich., 192, 197 (1880); Fischer v. Johnson, 51 Mo. App., 157 (1892); Salmon v. Fewell, 17 Mo. App., 118, 126 (1885); Fowler v. Carr, 63 Mo. App., 486, 491 (1895); Watson v. Menteer, 59 Mo. App., 387, 390 (1894); Nichols v. Lappin, 79 S. W., 995 (Mo. App., 1904); Missouri Trust Co. v. Cunningham, 81 Mo. App., 262 (1899); Missouri Trust Co. v. Wachter, 81 Mo. App., 263 (1899); Vogt v. Cunningham, 50 Mo. App., 136, 138 (1892); Groff v. Levan, 16 Pa. St., 179, 182 (1851); see, also, Hall v. Durham, 117 Ind., 429 (1888); Calvin v. Shimer, 15 Atl., 255, 256 (N. J. Ch., 1888).] See, however, Johnson v. Camp, 51 Ill., 219 (1869), *supra;* Cassilly v. Rhodes, 12 Ohio St., 88 (1843); Bittenger v. Baker, 29 Penn. St., 66 (1857), and cases there cited. [Ellison v. Dolbey, 3 Pennewill, 45 (Del., 1900); Cassell v. Ashley, 92 N. W., 1035, 1036 (Neb., 1902); Porche v. Bodin, 28 La. Ann., 761, 763 (1876); Brown v. Leath, 17 Tex. Civ. App., 262, 264 (1897).]

[A sale under a mortgage conveys to the purchaser all the growing crops of the tenant with notice, after condition broken. Reed v. Swan, 133 Mo., 100, 106 (1895). But the lessee is entitled to the crops gathered before he yields possession. Gray v. Worst, 129 Mo., 122, 135 (1895). However, if possession is wrongfully withheld until crops are gathered the purchaser's title thereto is not affected. Sugden v. Beasley, 9 Ill. App., 71, 77(1881). A statute changing the rule laid down in the text does not apply to an existing mortgage, although the crop was not in existence when the mortgage was made. Walton v. Fudge, 63 Mo. App., 52, 57 (1895).]

[The rule is the same in the case of a vendor's lien. Yates v. Smith, 11 Ill. App., 459, 461 (1882). Likewise, a purchaser of land under an order of sale for partition is entitled to the growing crops as against one claiming to be a tenant who was a party to the suit, but gave no notice of his rights. Hancock v. Caskey, 8 S. C., 282, 285 (1876).]

[A licensee is not entitled to crops which were growing at the time of service of writ of assistance although severed before possession obtained. See Robinson v. Fee, 42 Up. Can. Q. B., 448 (1878).]

[After a foreclosure sale has been made, or perhaps advertised, it would seem that, as against the purchaser the tenant who would sow must do it at his peril. Heavilon v. Farmers Bank, 81 Ind., 249, 254 (1881).]

[In Reily v. Carter, 75 Miss., 798 (1898), it is said that growing crops pass to the purchaser of land at foreclosure sale from the date of the confirmation of the sale; and it is immaterial that tenants in possession were not parties to the foreclosure suit. But in Wheat v. Brown, 3 Kan. App., 431, 434 (1896), it is said that where a tenant is not made a party to foreclosure proceedings, he is entitled to immature crops as against the purchaser of the land at foreclosure sale. See, also, St. John v. Swain, 14 N. Y. Supp., 743, 744 (1891). Where a tenant, having been made a party defendant to a foreclosure suit, is permitted by the purchaser to

sale on execution against the mortgagor, the crops being still growing on the land at the time of the foreclosure sale.[2] Such

retain possession until the crop is harvested, the title to the crop does not pass to the purchaser. Monday v. O'Neil, 44 Neb., 724, 728 (1895).]

[Where a trust deed provides that after a sale thereunder, the mortgagor in possession will hold as a tenant of the purchaser, it gives the mortgagor a right to ungathered crops nearly matured. Willis v. Moore, 59 Tex., 628, 637 (1883). A deed of trust, given by the owner of land, contained a clause providing that the owner should be permitted to occupy the land as tenant of the trustee, until a sale for default. The owner leased the land, and the lessee remained in possession after sale for default, and harvested crops sown by him. *Held*, that he was entitled to the crops as against the purchaser at the trustee's sale, his right being analogous to the right of an innocent under-lessee to emblements upon forfeiture of the lease by the first lessee. Gray v. Worst, 129 Mo., 122, 135 (1895).]

[As a mortgage creates no estate in the mortgagee, but confers upon him only a lien upon the estate of the mortgagor, which estate can be transferred only by foreclosure and sale, and as it can not be anticipated when such foreclosure and sale will be accomplished, and the right of possession under the statute extends one year beyond the sale, the tenancy is uncertain, and the general rule allowing emblements applies. Heavilon v. Farmers Bank, 81 Ind., 249, 253 (1881).]

[After a foreclosure sale, and prior to the expiration of the period of redemption, crops planted by a tenant of the mortgagor in possession belong to him, although harvested after the period for redemption has expired. Aultman Co. v. O'Dowd, 73 Minn., 58 (1898).]

[Of course the rule stated in the text does not apply where the mortgagee has assented to the agreement between the mortgagor and the tenant. Congden v. Sanford, Hill & Den., 196, 197 (N. Y., 1843).]

[In Hecht v. Dettman, 56 Iowa, 679, 680 (1881), it is held that a purchaser at a foreclosure sale has no right to growing crops which are matured, and which would have been severed before but for unfavorable weather.]

So a tenant occupying land under an heir or devisee where such land is incumbered by the statutory lien of the ancestor's debts (all the real estate of which the ancestor died seized descending to the heir or passing to the devisee chargeable with the ancestor's debts), within the statutory period during which such debts are a lien, sows crops at the risk of losing them in case of a sale to pay such debts, the case being analogous to that of a mortgage. Jewett v. Keenholts, 16 Barb., 193 (1853).

[2] Shepard v. Philbrick, 2 Den., 174 (1846); Sherman v. Willett, 42 N. Y., 150 (1870). See, also, Jewett v. Keenholts, 16 Barb., 193, 196 (1853); Bittenger v. Baker, 29 Penn. St., 68 (1857); Gillett v. Balcom, 6 Barb., 370 (1849), the case of a subsequent purchaser of the crops from the assignee in bankruptcy of the mortgagor. [Anderson v. Strauss, 98 Ill.,

485, 490 (1881); Rankin v. Kinsey, 7 Ill. App., 215, 219 (1880); Batterman v. Albright, 122 N. Y., 484 (1890).]

In Sherman v. Willett, the sale of the rye was at an administrator's sale; but in other respects the question was similar to that in Shepard v. Philbrick. In Sherman v. Willett, the court say: "The plaintiff took his title to the rye subject to the contingency that it might be wiped out by a foreclosure of the mortgage given by the intestate upon the land before the crop of rye was sown."

[As between a mortgagee in possession after default and execution creditors of the mortgagor, growing crops belong to the former. Hamblet v. Bliss, 55 Vt., 535 (1883).]

[Anyone purchasing growing crops from a mortgagor, where the mortgage is recorded and a foreclosure decree has been rendered, takes them subject to the contingency of his title being divested by a sale of the land before the crops ripen. Beckman v. Sikes, 35 Kan., 120, 122 (1886). See, also, Wootton v. White, 90 Md., 64 (1899).]

[As between a mortgagee of lands to whom, after default, the mortgagor has surrendered possession, and a chattel mortgagee of the growing crops whose rights have arisen since the giving of the mortgage upon the realty, such crops belong to the mortgagee of the land. Thompson v. Union Co., 110 Ala., 499 (1895). That the rights of a chattel mortgagee of crops are subordinate to those of a purchaser of the land at a foreclosure sale, see Penryn Fruit Co. v. Sherman-Worrell Fruit Co., 76 Pac., 484 (Cal., 1904); Brock v. Leighton, 11 Ill. App., 361, 364 (1882); Moreland v. Strong, 115 Mich., 211, 217 (1897); Bloomfield v. Hellyer, 22 Ont. App., 232 (1895). Likewise as to one holding a lien on the crop. Adams v. Moulton, McGloin (La.), 210, 212.]

[A mortgagee, taking peaceable possession of the land, has a right to any crops standing thereon. Bangor Bank v. Wallace, 87 Me., 28, 30 (1894). Growing crops pass under a deed or a mortgage of the land, and a mortgagee can enter and take them. Gilman v. Wills, 66 Me., 273, 275 (1877). But where a mortgagor, before the mortgage was due, yields possession of his farm to the mortgagee authorizing him "to rent same * * * and * * * apply net income upon my indebtedness," such mortgagee is not technically "in possession," and is not entitled to a growing crop planted by the mortgagor and previously sold by him. Sexton v. Breese, 135 N. Y., 387 (1892), aff'g 64 Supr. Ct. (57 Hun), 1 (1890).]

[A mortgagee demanding possession is entitled to crops as against a receiver. Bagnall v. Villar (1879), 12 Ch. D., 812, 813. Where growing crops are levied upon by a creditor of the mortgagor, before a receiver is appointed for the land at the instance of a mortgagee of the land, one who purchases the crops at the execution sale after the appointment of the receiver, can hold them as against the receiver. Favorite v. Deardorff, 84 Ind., 555, 557 (1882). Where a mortgagor remaining in possession after foreclosure sale, plants a crop, a purchaser in good faith of such crop is entitled to it as against a receiver subsequently appointed to take charge of and sell the crop for the purpose of paying a deficiency left after a sale of the land. Knox v Oswald, 21 Ill. App., 105 (1886).]

*crops, if unsevered, will pass, though over ripe and no [*255] longer drawing nourishment from the ground, the term "growing crops" usually used in such cases, meaning crops still annexed rather than ripe or unripe.[1]

[Stubble cane is a part of the realty, and covered by a mortgage as against third persons claiming interest. Penn v. Citizens' Bank, 32 La. Ann., 195, 199 (1880).]

[White v. Pulley, 27 Fed., 436 (U. S. C. C., Ala., 1886), holds a contrary rule to that stated in the text. Annual growing crops are to be treated as personal estate for the purpose of levy and sale on execution; hence, as between the grantee of land, and a prior purchaser of the growing crop thereon at a constable's sale, the latter is entitled to the crop. Voils v. Battin, 6 Kan. App., 742 (1897). A mortgage in Texas is but security, and the title to the property remains in the mortgagor; hence, if the mortgagor sells a growing crop prior to a sale of the land under a deed in trust, the buyer of the crop can hold it as against the purchaser of the land. Willis v. Moore, 59 Tex., 628 (1883); McKinney v. Williams, 45 S. W., 335 (Tex. Civ. App., 1898); Lombardi v. Shero, 14 Tex. Civ. App., 594, 597 (1896). One who buys crops from a mortgagor or at a sheriff's sale before the mortgagee takes possession or his right to enter has accrued, acquires title thereto. Favorite v. Deardorff, 84 Ind., 555, 557 (1882). Under a *levari facias* a sheriff can not sell the growing grain upon mortgaged premises as against the assignee thereof. Myers v. White, 1 Rawle, 353, 355 (Pa., 1829). As between a mortgagee of the land with the "rents, issues and profits thereof," and a subsequent chattel mortgagee of the crops, it is proper to sell the land separately from the crops in order that the surplus, if any, after satisfying the former mortgage, may be applied to the extinguishment of the latter. Treat v. Dorman, 100 Cal., 623 (1893). Nebraska adheres to the Ohio rule; and a purchaser of land at a foreclosure sale has no right to growing crops thereon, they being personalty, and a prior chattel mortgagee is entitled to them. Aldrich v. Bank of Ohiowa, 64 Neb., 276 (1902). Where a mortgagor does not release his homestead, the purchaser upon foreclosure acquires no right to growing crops thereon as against the holder of a chattel mortgage thereof given before the premises are surrendered. Brock v. Leighton, 11 Ill. App., 361, 364 (1882). A chattel mortgagee of crops is entitled to them if severed before the mortgagee of the land takes possession of the premises. Laing v. Ontario Loan Co., 46 Up. Can. Q. B., 114 (1881). A purchaser of land at a foreclosure sale takes the growing crop thereon subject to a privilege for supplies furnished to cultivate such crop. Weil v. Kent, 52 La. Ann., 2139 (1900).]

[1] Tripp v. Hasceig, 20 Mich., 254 (1870), in which case the crop in question was corn standing unharvested on the premises Dec. 13th, the date of the deed. [Damery v. Ferguson, 48 Ill. App., 224, 229 (1892); Sugden v. Beasley, 9 Ill. App., 71, 77 (1881); Firebaugh v. Divan, 207 Ill., 287, 290

It is also well settled that, unless otherwise disposed of expressly or by implication, crops growing upon land at the time of the death of the devisor, being a tenant in fee, go with the land to the devisee and not to the executor.[2] And the rule is so strong that if the devise be for life with remainder over, and

(1904), aff'g 111 Ill. App., 137 (1903); Vogt v. Cunningham, 50 Mo. App., 136, 139 (1892); McDowall v. Phippen, 1 Ont., 143, 145 (1881); see, also, Sullins v. State, 53 Ala., 474, 476 (1875); Allen v. Ashburn, 65 S. W., 45, 47 (Tex. Civ. App., 1901). In determining the rights of an administrator the courts take judicial notice that at certain dates crops are immature. Loeb v. Richardson, 74 Ala., 311, 314 (1883).] See, however, Powell v. Rich, 41 Ill., 466, 469 (1866). [Everingham v. Braden, 58 Iowa, 133, 134 (1882); Richards v. Knight, 78 Iowa, 69 (1889); First Nat. Bank of Clay Centre v. Beegle, 52 Kan., 709, 711 (1894); Porche v. Bodin, 28 La. Ann., 761 (1876); Meffert v. Dyer, 81 S. W., 643 (Mo. App., 1904). Grain which has matured and ready for harvest, does not pass to the purchaser of land at foreclosure sale. It possesses the character of personal chattels, and is not to be regarded as part of the realty. The course of vegetation has ceased and the soil is no longer necessary for its existence. The ground performs no other office than affording a resting-place for the grain, the same as a warehouse. Hecht v. Dettman, 56 Iowa, 679, 680 (1881). See, also, Foss v. Marr, 40 Neb., 559 (1894), where the crop was not considered by the appraisers in valuing the farm for the purposes of the sale.]

[Where a statute made it an offense to carry away "corn growing on the stalk," an indictment charging the defendant with carrying away corn attached to the realty is not sufficient, as the provision does not apply to ripe corn. Johnson v. State, 68 Ind., 43, 45 (1879).]

[2] Jones v. Jones, 2 Dev. Eq., 387 (1833); Creel v. Kirkham, 47 Ill., 344 (1868); Bradner v. Faulkner, 34 N. Y., 347 (1866); Smith v. Barham, 2 Dev. Eq., 423 (1833); Taylor v. Bond, Busb. Eq., 5, 24 (1852); Budd v. Hiler, 27 N. J. Law, 43 (1858); Dennett v. Hopkinson, 63 Me., 350 (1873); s. c., 13 Am. Law Reg. (N. S.), 359; Cooper v. Woolfit, 2 H. & N., 122 (1857); s. c., 3 Jur., N. S., 870; 26 L. J., Exch., 310; West v. Moore, 8 East, 339 (1807), per Ld. Ellenborough. Spencer's Case, Winch., 51 (1622); Bull. N. P., 34; Com. Dig., Biens, G 2. See, also, Gage v. Rogers, 1 Strobh. Eq., 376 (1847). [Hathorn v. Eaton, 70 Me., 219, 221 (1879); Pratte v. Coffman, 27 Mo., 424, 426 (1858); Shofner v. Shofner, 37 Tenn., 94 (1857); Dunford v. Jackson, 22 S. E., 853, 854 (Va., 1895). For similar rule as to fixtures, see, *post*, p. *312.]

If such appear to be the intention of the testator as shown by the will, the emblements may of course go to the executor, or to any other person designated therein. See Taylor v. Bond (*supra*); Rudge v. Winnall, 12 Beav., 357 (1849).

[Crops upon land at the time of the testator's death belong to the

the first taker die before severance of the crop growing at the death of the testator, it goes over with the land to the remainderman.[3] The distinction between heir and devisee, as to *emblements, though well settled, is anomalous and [*256] difficult of explanation.[4]

So, a widow is entitled to crops growing on the land assigned to her by the heir for dower.[5] So, as it seems, where

executors under 2 Gavin & Hord Statutes of Indiana, 494, § xxxiv. Humphrey v. Merritt, 51 Ind., 197, 200 (1875).]

[Where a statute provides that growing crops shall be distributed as personal estate, a devisee of land which is so devised as to include a crop growing thereon, takes the crop as a specific legacy. Stall v. Wilbur, 77 N. Y., 158 (1879); *Re* Clemens' Est., 9 N. Y. Supp., 474, 475 (1890).]

As to what words in a will are sufficient to pass emblements, see West v. Moore, 8 East, 339 (1807); Rudge v. Winnall (*supra*); Kinsman v. Kinsman, 1 Root, 180 (1790); Cox v. Godsalve (1691), Holt's MSS., 157; s. c., cited in 6 East, 604, note; 1 Wms. Exrs. (6th Lond. ed., 675); Bull. N. P., 34.

[A legatee of "farming stock" takes growing crops. Evans v. Williamson (1880), 17 Ch. D., 696, 697, disapproving Vaisey v. Reynolds, 5 Russ., 12.]

[3] Per Ruffin, C. J., in Smith v. Barham, 2 Dev. Eq., 423 (1833); Spencer's Case, Winch., 51 (1622), per Harris, J.; Co. Lit., 55 b, note (2). See, also, Grantham v. Hawley, Hob., 132 (1615). The reason of this rule will appear further on, p. *259.

[4] See Co. Lit., 55 b, note (2); Moore v. West, 8 East, 339, 343 (1807).

[5] Clark v. Battorf, 1 N. Y. Sup'me Ct. R., 58 (1873); Dyer, 316; 2 Inst., 81; 1 Greenl. Cru. Dig., tit. 6, ch. 2, § 29. [See Clark v. Banks, 6 Hous. (Del.), 584.]

She is said to be in *de optima possessione viri*, above the title of the executor. 2 Inst., 81. See, also, Ralston v. Ralston, 3 G. Greene, 533 (1852); Budd v. Hiler, 27 N. J. Law, 43 (1858); Whaley v. Whaley, 51 Mo., 36 (1872), where it is said that she is not entitled to the crops under her quarantine, and *held*, that she does not take the crops under the Missouri statute in substitution for quarantine.

[In Vaughn v. Vaughn, 88 Tenn., 742 (1890), the court followed the rule as to dower, and held that an allotment of a homestead to the widow carried growing crops.]

[Under Sec. 28 of the descent law, 1 R. S. (1876), p. 413, giving the widow and minor children the dwelling-house and fields adjacent for one year, the right to crops growing upon such fields at the death of the husband belong to the widow and children as against the administrator. Swain v. Bartlow, 62 Ind., 546, 548 (1878).]

[Where, by statute, the widow is entitled to a plantation without rent until her dower is assigned, and her dower is never assigned, she is entitled

the deceased was seized as a joint tenant, the crops sown go with the land to the survivor, and no moiety thereof passes to the personal representatives of the deceased.[6]

Besides the cases of tenants in fee simple and in fee tail already alluded to, the privilege of removing emblements is extended to a variety of other cases; and it may be stated as a general rule, that every person having an uncertain interest or estate in land, and whose estate is determined by the act of God, or by the happening of some uncertain event other than his own act, before the severance of the crops planted or sown by him thereon, shall have the right to remove the emblements; or, if the estate has been determined by reason of his death, they shall pass to his personal representatives.[7] The interest of the tenant in the land must however, be uncertain

to the crops. *Re* Merchant, 39 N. J. Eq., 506, 508 (1885), aff'd Merchant v. Comback, 41 N. J. Eq., 349 (1886).]

[Where a statute provides that "the executor or administrator may complete and gather a crop commenced by the decedent;" and also provides that the widow may retain possession of the dwelling house and the plantation connected therewith, the word "may" does not make it the absolute duty of the personal representatives to complete and gather the crop; and if the widow, in undisturbed possession of the plantation, gathers the crop, she is entitled to it. Blair v. Murphree, 81 Ala., 454 (1886).]

[6] Dyer, 316 a, pl. 2; 8 L. Ass., pl. 21; per Popham, J., in James v. Portman, Owen, 102 (1593); Rowney's Case, 2 Vern., 323 (1694); s. c., Eq. Ca. Abr., 69, pl. 11; Com. Dig. Biens, 9, 2, and cases cited; Co. Lit., 52 b. See, also, Haslett v. Glenn, 7 Harr. & John., 17 (1825). [See Pritchard v. Walker, 22 Ill. App., 286, 290 (1886).]

But where one joint tenant agrees that his co-tenant shall occupy all the land alone and sow it with his own corn, and he sows and dies before severance, his executors shall have the crop. James v. Portman (*supra*).

[7] See Com. Dig. Biens, G 2, and cases cited. [Adams v. Kauwa, 6 Hawaii, 280, 281 (1881).]

[Where a receiver is appointed for a tract of land pending the settlement of conflicting claims thereto, a party in possession who had planted crops prior to the decision of his claim thereto and before the application for a receiver, should be allowed a reasonable time to collect his crop, the situation being analogous to that of a tenant whose term is uncertain. Chappell v. Boyd, 56 Ga., 578, 582 (1876).]

[Where two persons claim, in good faith, to be tenants of the same land, and the one in possession plants a crop before the other institutes a forcible detainer suit, which is, on appeal, decided against the tenant in

as to its duration; and where it is certain, there exists no right to emblements.[8]

*Every demise between landlord and tenant in respect [*257] to matters in which the contract is silent may, however, fairly be open to explanation by the general usage and custom of the country or district where the land lies;[9] and a custom that a tenant whether by parol or by deed shall have the way going crop after the expiration of his term is good, if such custom is not repugnant to the lease under which he holds,[10] and the

possession, the latter is entitled to the mature ungathered crop. McKean v. Smoyer, 37 Neb., 694 (1893).]

[But a tenant at sufferance is not entitled to emblements. Miller v. Cheney, 88 Ind., 466, 470 (1882).]

[8] Co. Lit., 55 a; Litt., § 68; Davies v. Connop, 1 Price, 53 (1814); Clarke v. Rannie, 16 Lans., 210 (1871); Harris v. Carson, 7 Leigh, 632 (1836); Mason v. Moyers, 2 Rob. (Va.), 606 (1844); Kelley v. Todd, 1 W. Va., 197 (1866); Whitmarsh v. Cutting, 10 John., 360 (1813); Bain v. Clark, 10 John., 424 (1813), where it was also *held*, that the fact that the lessor agreed to renew the lease at the end of the term (one year), provided he did not want the farm for his own use, did not alter the case, as the period of the lease was fixed and the tenant had no interest beyond that period. See, also, Caldecott v. Smythies, 7 C. & P., 808 (1837). [Thomas v. Noel, 81 Ind., 382, 383 (1882); Wheeler v. Kirkendall, 67 Iowa, 612 (1885); Direks v. Brant, 56 Md., 500, 502 (1881); Sanders v. Ellington, 77 N. C., 255, 258 (1877); Sharp v. Kinsman, 18 S. C., 108, 114 (1882); see, also, Smith v. Sprague, 119 Mich., 148 (1899); Reeder v. Sayre, 70 N. Y., 180 (1877). Nor can a sub-lessee acquire any greater right. Gossett v. Drydale, 48 Mo. App., 430, 433 (1892). But see Meffert v. Dyer, 81 S. W., 643 (Mo. App., 1904).]

[Where one having a pre-emption right to land of the United States, sows crops which are immature when his right expires, such crops belong to a subsequent purchaser of the land. Rasor v. Qualls, 4 Blackf., 286 (Ind., 1837).]

[The crop growing upon land at the termination of the particular estate [until twenty-one] is the property of the remainderman. Miller v. Cheney, 88 Ind., 466, 470 (1882).]

[9] Van Ness v. Pacard, 2 Pet., 137 (1829). [See Clark v. Banks, 6 Hous. (Del.), 584.]

[10] See Wigglesworth v. Dallison, Doug., 201 (1779); Hutton v. Warren, 1 M. & W., 466 (1836); s. c., Tyr. & Gr., 646; Griffiths v. Puleston, 13 M. & W., 358 (1844); Dorsey v. Eagle, 7 Gill & J., 331 (1835); Foster v. Robinson, 6 Ohio St., 90 (1856); Templeman v. Biddle, 1 Harring., 522 (1835), *holding*, that in Delaware the way going tenant is by general custom entitled to the wheat crop, though it is otherwise as to the oat crop.

proof of the custom lies with the tenant.[11] In general, how- [*258] *ever, the rule is as above stated. Thus, emblements growing on the land at the death of the tenant for life go to his

[Ellison v. Dolbey, 3 Pennewill, 45, 54 (Del., 1900); Harris v. Gregg, 17 App. Div., 210, 211 (N. Y., 1897); see, also, Clark v. Banks, 6 Hous. (Del.), 584.]

The custom stated in the text is said to be a part of the common law of Pennsylvania and New Jersey, where a tenant for a term certain is entitled to his way going crop unless there is an exception in the lease. Van Dorens v. Everitt, 2 South., 460 (1819); Iddings v. Nagle, 2 W. & S., 22 (1841); Biggs v. Brown, 2 S. & R., 14 (1815); Demi v. Bossler, 1 Penn., 224 (1829); Clark v. Harvey, 54 Penn. St., 142 (1867); Comfort v. Duncan, 1 Miles, 229 (1836); Stultz v. Dickey, 5 Binn., 285 (1812); Craig v. Dale, 1 W. & S., 509 (1841); Forsythe v. Price, 8 Watts, 282 (1839); Diffedorfer v. Jones (1782), cited in 5 Binn., 289, and 2 Binn., 487. [Shaw v. Bowman, 91 Pa. St., 414, 418 (1879); see, also, McKay v. Pearson, 6 Pa. Super., 529, 534 (1898); Whorley v. Karper, 20 Pa. Super., 347, 349 (1902).] But this custom in Pennsylvania is confined grain sowed in autumn before the expiration of the lease, to be reaped in the summer after it determines. Demi v. Bossler (*supra*). See, also, Howell v. Schenk, 24 N. J. Law, 89 (1853); Hunter v. Jones, 3 Brewst., 370 (1866).

However, in Harris v. Carson, 7 Leigh, 632 (1836), evidence of a local custom for the outgoing tenant of land leased for a fixed and determinate period to have the way going crop, was held inadmissible, it being in derogation of the common law and not immemorial. See, also, Mason v. Moyers, 2 Rob. (Va.), 606 (1844); Kelley v. Todd, 1 W. Va., 197 (1866).

As to the requisites of a valid custom, see notes to Wigglesworth v. Dallison, 1 Smith's Lead. Cas., *675, *et seq.*

See, also, Hughes v. Gordon, 1 Bligh, 312 (1819), where Lord Redesdale in referring to Wigglesworth v. Dallison, said: "The court held that a general custom applicable to lands gave a construction to the deed. The real state of the case is that where custom warrants a way going crop, unless the tenant has the way going crop, he has not in effect the land for 21 years." See, also, Iddings v. Nagle (*supra*).

[11] Caldecott v. Smythies, 7 C. & P., 808 (1837). [See Direks v. Brant, 56 Md., 500, 503 (1881).]

["Whatever is matter of general custom, as the tenant's right to sow an away-going crop, to have possession of the part of the premises sown for the purpose of manuring, protecting and saving the same, and to exclude others from it, and his duty to cultivate and manage the farm rented by him in a good and husbandlike manner, need not be proved to the jury, but may be taken notice of as if proved, because it is part of the contract proved, being affixed by law." Clark v. Banks, 6 Hous. (Del.), 584.]

executors or administrators as his goods and chattels.[12] In like manner a tenant *pur autre vie* on the termination of his estate by the death of the *cestui que vie* is entitled to his emblements.[13] So, if a man be seized of land in the right of his wife, and sows the ground and then dies, his executors shall have the crop; and if his wife die before him he shall have the crop.[14] So, where the husband of a tenant for life only, is in possession and tills and plants the land, and the wife dies before severance.[15] So, where a tenant for years, *si tamdiu vixerit*, sows and dies before severance, his personal representatives shall have the crop on account of the uncertainty of the determination of his estate.[16] So, where a tenant for life makes a lease for years and dies before the expiration of the term, the under-tenant is entitled to emblements.[17]

[12] Com. Dig. Biens, G 2; Thornton v. Burch, 20 Geo., 791 (1856); McLaurin v. McCall, 3 Strobh., 21 (1848); Perry v. Terrel, 1 Dev. & Bat. Eq., 441 (1836). [Corle v. Monkhouse, 47 N. J. Eq., 73, 75 (1890); Poindexter v. Blackburn, 36 N. C., 286, 289 (1840); Brooks v. Brooks, 12 S. C., 422, 454 (1879).]

[Nor is the rule changed because the land is exempt as a homestead. Dickey v. Wilkins, 17 So., 374 (Miss., 1895).]

[The life-tenant is the owner of a crop planted during his life, and may dispose of the same as against the remainderman. Shaffer v. Stevens, 143 Ind., 295, 297 (1895).]

[This matter is regulated by statute in South Carolina. See Newton v. Odom, 45 S. E., 105, 107 (S. C., 1903).]

[13] Dyer, 316 a, pl. 2; Weems v. Bryan, 21 Ala., 302 (1852); Kelly v. Webber, 11 Ir. Com. Law, 57 (1860). But not to crops sown after the termination of the estate, Kelly v. Webber. [See, *post*, p. *262.]

[14] Dyer, 316 a, pl. 2; Co. Lit., 55 b.

But it is said that if the land was sown before the marriage, the wife shall have the corn. 1 Rolle Abr., 727, pl. 17. See, also, Haslett v. Glenn, 7 Harr. & John., 17 (1825), and the authorities cited *supra* in note ([12]).

[15] Spencer v. Lewis, 1 Houst., 223 (1856); Co. Lit., 55 b. [King v. Whittle, 73 Ga., 482, 483 (1884).]

[16] 1 Roll. Abr., Emblements, A, pl. 12, p. 727.

[17] Co. Lit., 55 b; Bevans v. Briscoe, 4 Har. & John., 139 (1816). [Dorsett v. Gray, 98 Ind., 273, 275 (1884); see, also, King v. Foscue, 91 N. C., 116, 118 (1884); Noble v. Tyler, 61 Ohio St., 432, 438 (1899).]

[And it makes no difference that the under-tenant knows that the life-tenant is dying, and sows the crop the day before his death. To hold otherwise, where the health of the tenant for life was failing, would subvert an important object of the rule—the encouragement of husbandry—and open a fruitful source of unseemly litigation, as the tenant would

Before the making of the Statute of Merton, 20 H. 3, ch. 2 (*anno*, 1235), it was a question whether the personal representatives of a tenant in dower should have the growing crops sown by her, or whether they should go to him in reversion;[18] but since that statute her personal representatives are entitled to emblements, the same as those of any other tenant for life.[19] If a dowress sows the land, and then takes husband, who dies before severance, the dowress shall have the crop, and not the [*259] *personal representatives of the husband. But if the husband of a dowress sows the land, and dies before severance, then his personal representatives shall have the crop.[20]

The personal representatives of a tenant by the courtesy are entitled to emblements like those of any other tenant for life.[21]

As has been already stated, one ground of the rule that the personal representatives of a tenant for life shall have the emblements, is to compensate him for the labor and expense of the tilling, manuring and sowing the land, performed and incurred by his testator or intestate; and there are cases where this reason of the rule failing, the rule itself is not applicable. Thus, if A. seized of land sows it with corn and then conveys it away to B. for life, remainder to C. for life, and then B. dies before severance, C. shall have the crop and not the personal representative of B., though his estate was uncertain, for the reason

naturally hesitate to put in crops which might be successfully claimed by his successor. Nor is the right to emblements affected by the fact that such sowing is hurriedly and imperfectly done, as that would be wholly the loss of the sower; though the fact of a hurried and imperfect mode of sowing might have been of pertinence to the question if raised, whether the tenant was in reality sowing or only pretending to do so. Bradley v. Bailey, 56 Conn., 374 (1888).]

[18] See 2 Inst., 80, 81; Bract., Lib. 2, fol. 96.

[19] Com. Dig. Biens, G 2; 1 Wms. Exrs. (6th Lond. ed.), 677. See, also, Talbot v. Hill, 68 Ill., 106 (1873).

[The doctrine of emblements does not apply to crops growing upon land at the death of a widow to whom, by will, one-third part of all the grain raised upon certain land had been given during her life, to be delivered as soon as harvested. Miller v. Wohlford, 119 Ind., 305 (1889).]

[20] Bro. Abr., tit. Emblts., pl. 26; 1 Wms. Exrs. (6th Lond. ed.), 678.

As to emblements of an estate settled in jointure, see Fisher v. Forbes (1734), 9 Vin. Abr., tit. Emblts., p. 373, pl. 82.

[21] 1 Roper Husb. and Wife, *35, 1 Wms. Exrs. (6th Lond. ed.), 679.

of industry and charge in B. has failed.[22] And in such case, if both B. and C. die before severance, the crop shall not go to the personal representatives of either of them, but shall revert to A.[23]

The right to emblements, however, does not obtain till the seed is sown, the common law having drawn a distinction between the right to emblements and the cost of the preparation of the ground for the reception of the seed. Thus, where a tenant at will is ousted after ploughing and manuring the land, or the term of the lessee for years of a tenant for life is determined by the death of the tenant for life, after the ground is prepared, but before the seed is actually sown, he wholly loses his costs and labor, though had he planted, he would have been entitled to emblements.[24]

*The personal representatives of the incumbent of an [*260] ecclesiastical benefice would probably at common law also be entitled to the emblements of the glebe lands; for the interest of the deceased incumbent in the land was uncertain and determined by the act of God.[25] However that may be, the right was fully established by the statute 28 Hen. 8, c. 11, § 6, which enacted, that in case any incumbent happened to die, and before his death had caused any of his glebe lands to be manured and sown at his proper costs and charges with any corn or grain, then in that case such incumbent might make and declare his testament of all the profits of the corn growing upon the said glebe lands so manured and sown.

The estate of a tenant at will, also, being uncertain, if it is

[22] Grantham v. Hawley, Hob., 132 (1615); Cro. Eliz., 61, 464; Smith v. Barham, 2 Dev. Eq., 423 (1833), per Ruffin, C. J.; Spencer's Case, Winch., 51 (1622), per Harris, J.; Co. Lit., 55 b, note (2). [See Gardner v. Perry, 39 Can. Law J., 670 (Ont., 1903).]

[23] Gilb. Ev., 215; Hob., 132, in margin.

[24] Bro. Abr., tit. Emblements, 7; tit. Tenant per Copie de Court Roll, pl. 7; Price v. Pickett, 21 Ala., 741 (1852); Thompson v. Thompson, 6 Munf., 518 (1820); Stewart v. Doughty, 9 John., 112 (1812). [Carman v. Mosier, 105 Iowa, 367, 369 (1898); Collins v. Crownover, 57 S. W., 357 (Tenn. Ch. App., 1900).]

[25] See 1 Wms. Exrs. (6th Lond. ed.), 676; 2 Bl. Com., 123, 145.

But a parson who resigns his living is not entitled to emblements. Bulwer v. Bulwer, 2 B. & Ald., 470 (1819); Debow v. Colfax, 10 N. J. Law, 128 (1828). See, also, Betham v. Gregg, 10 Bing., 352 (1833).

determined either by his death or the act of his landlord, he in the one case, and his executors or administrators in the other, shall reap what he has sown.[26] A tenant under the court for a term of years pending a cause, is in the nature of a tenant at will, and is entitled to emblements.[27] So, where a lease is determined by the landlord while a crop is in the ground, under a provision in the lease giving him the right so to do upon giving six months notice, the tenant is entitled to emblements.[28] But where the estate is determined by the act of the tenant, or by a forfeiture caused by his act or default, he is not entitled to emblements.[29] So where the estate of the husband in the

[26] Stomfil v. Hicks, Holt, 414 (1669); Eaton v. Southby, Willes, 131, 136 (1739); Reilly v. Ringland, 39 Iowa, 106 (1874); Simpkins v. Rogers, 15 Ill., 397 (1854); Davis v. Brocklebank, 9 N. H., 73 (1837); Litt., § 68. See, also, Harrison v. Chomeley, Cary, 72 (1561). [Reilly v. Ringland, 44 Iowa, 422, 424 (1876); Dobbins v. Lusch, 53 Iowa, 304, 309 (1880); Towne v. Bowers, 81 Mo., 491 (1884); Willis v. Moore, 59 Tex., 628, 637 (1883); see, also, Monday v. O'Neil, 44 Neb., 724, 727 (1895); Reynolds v. Reynolds, 55 Supr. Ct. (48 Hun), 142, 148 (N. Y., 1888).]

[27] O'Connell v. O'Callaghan, 3 Ir. Eq., 199 (1841).

[28] Stewart v. Doughty, 9 John., 108 (1812).

[Where the lessor, by failing to perform his contract (in this case failing to advance money to take off the crop), causes the lessee to leave, the latter does not lose his right to the crop. Young v. Gay, 41 La. Ann., 758 (1889).]

[Where a guardian makes a lease extending beyond his ward's minority, the lessee is bound for the full time, and it is optional with the ward whether he will ratify it. If the ward disaffirms as to the excess, the lessee is entitled to emblements. Nawahi v. Hakalau Plantation Co., 14 Hawaii, 460, 461 (1902).]

[29] Davis v. Eyton, 7 Bing., 154 (1830); S. C., 4 M. & P., 820. In this case the lease contained a condition that if the lessee incurred any debt upon which he should be sued to judgment and execution, the lessor might enter as of his former estate; and the lessor re-entering after judgment and execution, *held*, that the lessee was not entitled to emblements, the execution being the immediate and necessary consequence of his own act. This case was approved and followed in Hunter v. Jones, 3 Brewst., 370 (1866).

So in Oland's Case (or Oland v. Burdwick), 5 Co., 116 a (1602); S. C., Mo., 394; Cro. Eliz., 460; Goldsb., 189, it was *held*, that if a feme copyholder, *durante viduatate sua*, according to the custom of the manor, sows the land and before severance takes baron, the lord of the manor shall have the crop. See, also, Hawkins v. Skeggs, 10 Humph., 31 (1848); Com. Dig., Biens, G 2; 2 Inst., 81. In the report of this case in 5 Co., it is also said: "So if a woman seized of land *durante viduatate sua*, makes a lease for

years, and the lessee sows the land, and afterwards the woman who made the lease takes husband, the lessee shall not have the emblements; for although his estate is determined by the act of a stranger, yet he shall not be (as to the first lessor) in a better condition than his lessor was.''

But in 1 Rolle's Abr., Emblements, p. 727, pl. 10, the rule is stated to be that in such case the lessee shall have the emblements, for her act shall not prejudice a third person. The law is also so laid down by Blackstone, 2 Com., 124; and the latter seems the preferable rule. See, also, the report of the case in Cro. Eliz., 460; Bulwer v. Bulwer, 2 B. & Ald., 470 (1819), per Abbott, C. J.; Debow v. Colfax, 10 N. J. Law, 128 (1828). But the under lessee himself must have sown the crop, in order to be entitled to it. Debow v. Colfax (*supra*). [See, *ante*, p. *259.]

[A purchaser of growing crops in good faith before forfeiture, or a sub-lessee, is entitled to them as against the landlord. Miller v. Havens, 51 Mich., 482 (1883); Gray v. Worst, 129 Mo., 122, 135 (1895). See, also, Carney v. Mosher, 97 Mich., 554 (1893). As between a purchaser of growing crops at an execution sale, and the landlord afterwards recovering possession for non-payment of rent, the crops belong to the purchaser. Russell v. Moore (1880), 8 L. R., Ire., 318.]

[Where a lessee violates a provision in his lease against subletting, the lessor can not, by making a lease to another, but without taking any steps to terminate the first lease, deprive the sub-lessee of a crop harvested by him. Winkler v. Gibson, 2 Kan. App., 621 (1895).]

[Upon tenant's failure to pay rent and his surrender of the premises to his landlord, the latter can hold the crop as against a chattel mortgagee thereof. Gregg v. Boyd, 76 Supr. Ct. (69 Hun), 588 (N. Y., 1893).]

A tenant may also lose the right to emblements by an abandonment of the possession of the land where they are growing. Carpenter v. Jones, 63 Ill., 517 (1872); Chandler v. Thurston, 10 Pick., 205, 210 (1830). [Silva v. Barr, 141 Cal., 599 (1904); Kiplinger v. Green, 61 Mich., 340, 347 (1886); see, also, Smith v. Sprague, 119 Mich., 148, 149 (1899).]

[If a tenant abandons or surrenders the premises, growing crops thereon pass to the landlord as incident to his restoration to the possession and to the termination of the tenancy. No right or interest remains in the tenant although the landlord may agree at the time of surrender to apply the proceeds of the crop upon the tenant's debts. Shahan v. Herzberg, 73 Ala., 59, 63 (1882). And such crops can not be levied upon as the property of the tenant. Wheat v. Watson, 57 Ala., 581 (1877).]

[When lessees abandon the leasehold and crop, the lessor has a right to resume possession and harvest the crop, and apply same toward unpaid rent and the expense of harvesting. Charles v. Davis, 59 Cal., 479, 480 (1881). The rule is the same as against a mortgagee of the crop. Fry v. Ford, 38 Ark., 246, 255 (1881).]

[Where a tenant, by public vendue, sells growing wheat, no rent being due at the time, and afterwards surrenders possession to his landlord, the purchaser is entitled to the same; otherwise it would offer opportunity for collusion between landlord and tenant. Nye v. Patterson, 35 Mich.,

[*261] *wife's lands is determined by a decree of divorce for his misconduct, and the wife restored to all her rights in her lands, the husband has no right to emblements.[1]

A tenant has no right to emblements or the way-going crop as against one claiming by title paramount to that of his landlord.[2] So after regress made by a disseisor, the disseisee shall

413, 414 (1877). And a surrender can not affect a purchaser where the landlord has been notified of the sale prior to such surrender. Shaw v. Bowman, 91 Pa. St., 414, 417 (1879).]

[The tenant has a right to sell his growing crops, although he has abandoned the land, where it does not appear that there was any right of forfeiture by the landlord. Dayton v. Vandoozer, 39 Mich., 749 (1878).]

See, also, Talbot v. Hill, 68 Ill., 106 (1873), where the right of a dowress to emblements sown by her was *held* to be lost by her consenting to a sale of the premises disencumbered of dower, by a commissioner, and the award of one-seventh of the proceeds of the sale in lieu of dower, her estate being considered as terminated by her own act.

[See, further, upon the tenant's losing his right to emblements by a termination of his estate caused by his default, Schmidt v. Williams, 72 Iowa, 317 (1887); Samson v. Rose, 65 N. Y., 411 (1875).]

[1] Jenney v. Gray, 5 Ohio St., 45 (1855).

But in Oland's Case, 5 Co., 116 b (1602); 1 Rolle Abr., Emblts., 726, pl. 7, it is laid down that if a lease is made to baron and feme during coverture, and the baron sows a crop and afterwards they are divorced *causa praecontractus*, the baron shall have the emblements, because the sentence is the act of the law.

[Where land is allowed to the wife as alimony, she is entitled to a growing crop thereon, planted by the husband after the divorce proceedings are commenced. Herron v. Herron, 47 Ohio St., 544 (1890).]

[2] Howell v. Schenck, 24 N. J. Law, 89 (1853). [Yates v. Smith, 11 Ill. App., 459, 461 (1882); Rowell v. Klein, 44 Ind., 290, 295 (1873).]

E. g., as in the case of a lease by a mortgagor subsequent to the execution of the mortgage, the tenant in such case not being entitled to emblements as against the mortgagee. See Howell v. Schenck (*supra*); and the cases cited *ante*, p. *254, note (1).

[Where a tenant is not made a party to the suit his right to crops is not affected. Hooper v. Payne, 94 Ala., 223 (1891).]

[Crops planted by the lessee in possession before the commencement of the action, are not recovered by the plaintiff in ejectment. Collier v. Cunningham, 2 Ind. App., 254, 262 (1891).]

[A mortgagee of a growing crop has no right thereto as against the successful plaintiff in ejectment; though it is otherwise as to any portion of the crop which has been made a chattel by severance before the plaintiff is put in possession. Huerstal v. Muir, 64 Cal., 450, 453 (1884).]

[A tenant of one who has a contract for the purchase of land, owns the

*have the corn, though sowed by the disseisor.[3] And if [*262] the lessee of a tenant for life be disseised, and the lessee of the disseisor sow the land, and then the tenant for life dies, and he in remainder enters, yet he shall not have the emblements, but the lessee of the tenant for life.[4] As between the successful plaintiff in an ejectment and the evicted defendant, growing crops are a part of the realty, and are included in the recovery;[5] and if an evicted defendant in ejectment enters and

hay and apples gathered by him while his possession is allowed to continue, as against the party holding the legal title to the land. His rights are similar to those of a mortgagor in possession or of a tenant at will. Look v. Norton, 94 Me., 547 (1901). And such a tenant is entitled to emblements although the crop is sown a considerable period after a cause of forfeiture existed against his landlord. Sornberger v. Berggren, 20 Neb., 399 (1886).]

[3] Dyer, 31 b, pl. 219. See *ante*, chap. 2, p. *64 [and, *post*, p. *442].

[If the person who planted the crop, carries it away after yielding possession, he is criminally liable under ¶7157, Gen. Stat. of 1889. State v. Salisberry, 49 Kan., 160 (1892).]

But where one enters and ousts the owner of land, and, continuing in the possession and occupancy thereof, cuts and removes the crops sown by the owner, the owner cannot maintain replevin for such crops so removed. His remedy is by trespass *quare clausum fregit* for mesne profits after recovering possession in ejectment or by re-entry. De Mott v. Hagerman, 8 Cow., 220 (1828). [See, *post*, p. *420; also, *post*, p. *433. Martin v. Thompson, 120 U. S., 376 (1886); Rathbone v. Boyd, 30 Kan., 485, 491 (1883); see, also, Caldwell v. Custard, 7 Kan., 303 (1871); Lindsay v. Winona & St. Peter R. R. Co., 29 Minn., 411, 413 (1882); Adams v. Leip, 71 Mo., 597, 598 (1880); Jenkins v. McCoy, 50 Mo., 348 (1872); Hinton v. Walston, 115 N. C., 7, 9 (1894); Wakefield v. Dyer, 76 Pac., 151 (Okla., 1904); Phillips v. Keysaw, 7 Okla., 674, 685 (1899). But see Rowell v. Klein, 44 Ind., 290, 296 (1873).]

[4] Knevett (or Knivet) v. Pool (or Poole), Cro. Eliz., 463 (1596); s. c., 5 Co., 85 a; Goldsb., 143.

[5] Altes v. Hinckler, 36 Ill., 275 (1864); Strode v. Swim, 1 A. K. Marsh., 366 (1818); Doe v. Witherick, 3 Bing., 11 (1825); s. c., 10 Moore, 267; Hodgson v. Gascoigne, 5 B. & Ald., 88 (1821); Brothers v. Hurdle, 10 Ired. Law, 490 (1849); McLean v. Bovee, 24 Wis., 295 (1869); King v. Fowler, 14 Pick., 238 (1833); Rowell v. Klein, 44 Ind., 290 (1873); s. c., 15 Am. R., 235. See, also, Crotty v. Collins, 13 Ill., 567 (1852). [See, *post*, p. *441. Carlisle v. Killebrew, 89 Ala., 329, 332 (1889); McGinnis v. Fernandes, 135 Ill., 69, 73 (1890), aff'g 32 Ill. App., 424, 425 (1889); Huston v. Skaggs, 7 Ky. Law R., 592 (Super., 1886); Davis v. Callahan, 66 Mo. App., 168, 173 (1896); Kirtley v. Dykes, 10 Okla., 16, 23 (1900); see, also, Mitchell v. Tschida, 71 Minn., 133, 135 (1898); and Bloemendal v.

carries away crops sown pending the suit, the plaintiff may maintain trover for their value.[6] But a tenant *pur autre vie*, holding over after the determination of his estate by the death of the *cestui que vie*, does not thereby forfeit his right to the crop sown during the subsistence of his tenancy, though

Albrecht, 79 Minn., 304, 305 (1900), as to the rule in Minnesota under the statute.]

[Where a landlord, without the consent of his tenant, and before the tenancy is terminated, lets the field to another who, over the objection of the prior tenant, sows wheat, and by threats of violence prevents the prior tenant from harvesting it, the prior tenant being entitled to possession of the field at harvest time, the subsequent tenant has no right to the wheat. Hubbard v. Berry, 10 Ind. App., 594 (1894).]

[The rule stated in the text applies even though the defendant in actual possession pending litigation has made a contract with the plaintiff to pay rent to the true owner, if such defense is not pleaded in the ejectment suit, and the plaintiff recovers no rent. Craig v. Watson, 68 Ga., 114 (1881).]

So, where plaintiffs brought suit against several defendants to set aside as fraudulent a conveyance of lands by one of said defendants to the others, to compel a conveyance to plaintiffs, to be put in possession and to procure a receiver of the growing crops thereon, the plaintiffs claiming to have succeeded before suit brought to the title of the fraudulent grantor under a judgment against him subsequent to said fraudulent conveyance, and a judicial sale and sheriff's deed thereunder, it was *held*, that the growing grain was a part of the land, and that plaintiffs were entitled thereto, if entitled to recover the land. Corcoran v. Doll, 35 Cal., 476 (1868). In this case the principal parties defendant being alleged to be insolvent and the transaction on the part of the defendants to be a scheme to defraud the plaintiff, an order *pendente lite* for an injunction and a receiver to take possession of, harvest, and preserve the grain crop was held to have been properly made.

[While a fraudulent conveyance of land would pass growing crops as between the parties, it will not prevent creditors of the grantor from levying upon the crops. Pierce v. Hill, 35 Mich., 194, 200 (1876).]

[And see Erickson v. Paterson, 47 Minn., 525 (1891), where a fraudulent conveyance of a homestead did not defeat a subsequent levy upon the growing crops.]

[6] Altes v. Hinckler (*supra*). See, also, the cases cited in note next above. [See McGinnis v. Fernandes, 32 Ill. App., 424 (1890).]

[Replevin may also be maintained, either against the defendant or a member of his family. Oyster v. Oyster, 32 Mo. App., 270 (1888).]

[Where the plaintiff in ejectment recovers, he is entitled to the crops, growing or cut and shocked, which were planted after the action was commenced. McCaslin v. State, 99 Ind., 428, 442 (1884).]

*evicted by ejectment founded upon the determination [*263] of his interest; the tenant's rights in respect of such crop, are not affected by the proceedings in ejectment, the landlord's recovering in ejectment entitling him to the crop only in cases where his title is antecedent to the sowing of the crop. But the tenant is not entitled to harvest a crop sown by him after the determination of his estate and demand of possession, such crop passing by virtue of the recovery in the ejectment.[7]

When there exists a right to emblements, the party entitled to the right has by law "free entry, egresse and regresse" so much as is necessary in order to cut and carry them away; "for when the law doth give anything to me, it giveth impliedly whatsoever is necessary for the taking and enjoying of the same."[8] But this right of entry, egress and regress, should be exercised within a reasonable time.[9]

A tenant who is entitled to emblements having an exclusive interest therein, may, though not in possession of the land, maintain trespass *quare clausum fregit* against the landlord for the taking of or injury to his emblements.[10]

[7] Kelly v. Webber, 11 Ir. Com. Law, 57 (1860). See, also, 9 Vin. Abr., Emblts., p. 368, pl. 27, 34; Bro. Abr., Emblts., pl. 25, citing 30 E. 1, and Fitzh., Villenage, pl. 45; Bro. Abr., Emblts., pl. 16, citing 46 Ass., 2. See, also, Dame v. Dame, 38 N. H., 429 (1859). [See, *ante*, p. *258. Samson v. Rose, 65 N. Y., 411 (1875); see, also, Baker v. McInturff, 49 Mo. App., 505, 506 (1892).]

[8] Litt., § 68; Co. Lit., 55 a, 56 a; Stewart v. Doughty, 9 John., 108 (1812); Lewis v. McNatt, 65 N. C., 63 (1871); Humphries v. Humphries, 3 Ired., 362 (1843); Reilly v. Ringland, 39 Iowa, 106 (1874); Bevans v. Briscoe, 4 Har. & John., 139 (1816); Eaton v. Southby, Willes, 131, 136 (1739). [Dobbins v. Lusch, 53 Iowa, 304, 309 (1880); Towne v. Bowers, 81 Mo., 491, 498 (1884); Sexton v. Breese, 135 N. Y., 387, 392 (1892); see, also, Clark v. Banks, 6 Hous. (Del.), 584; *Re* Hussey, 2 Haskell, 244, 245 (U. S. Dist. Ct., Me., 1878); McKay v. Pearson, 6 Pa. Super., 529, 534 (1898). And a buyer from the tenant has also the right. Shaw v. Bowman, 91 Pa. St., 414, 418 (1879).]

[9] Lewis v. McNatt, 65 N. C., 63 (1871). This was a lease of turpentine trees, and the time within which the way-going crop in that case should be removed was stated to be before the sap begins to flow in the subsequent spring, for then the new turpentine mingles with the old "scrape" which cannot then be removed without interfering with the rights of the owner of the trees.

[10] Stewart v. Doughty, 9 John., 108 (1812); Forsythe v. Price, 8 Watts,

As has been already stated, emblements, or *fructus industriales*, as distinguished from spontaneous products or permanent fruits, seem in most respects to be considered by the law as chattels. In addition to passing to the executor instead of to the heir, they may, while yet unripe and unsevered, be seized [*264] *and sold on a *fi. fa.* as personal property.[11] It was not, however, till the statute of 11 Geo. II., ch. 19, that the landlord had power to distrain corn, grain, or other produce growing on

282 (1839). See, also, Crosby v. Wadsworth, 6 East, 602 (1805). [See Clark v. Banks, 6 Hous. (Del.), 584.]

[11] Parham v. Thompson, 2 J. J. Marsh., 159 (1829); Thompson v. Craigmyle, 4 B. Mon., 391 (1844); Brittain v. McKay, 1 Ired. Law, 265 (1840); Craddock v. Riddlesbarger, 2 Dana, 205 (1834); Stewart v. Doughty, 9 John., 112 (1812); Whipple v. Foot, 2 John., 418 (1817); Penhallow v. Dwight, 7 Mass., 34 (1810). See, also, Shannon v. Jones, 12 Ired., 206 (1851); Adams v. Tanner, 5 Ala., 740 (1843). [McKenzie v. Lampley, 31 Ala., 526, 528 (1858); Favorite v. Deardorff, 84 Ind., 555, 558 (1882); Lindley v. Kelley, 42 Ind., 294, 304 (1873); Polley v. Johnson, 52 Kan., 478 (1893); Mabry v. Harp, 53 Kan., 398, 399 (1894); Moreland v. Myall, 77 Ky., 474, 478 (1879); Preston v. Ryan, 45 Mich., 174, 175 (1881); Sims v. Jones, 54 Neb., 769 (1898); Smith v. Tritt, 18 N. C., 241, 242 (1835); Hershey v. Metzgar, 90 Pa. St., 217, 218 (1879); Edwards v. Thompson, 85 Tenn., 720, 721 (1887); Horne v. Gambrell, 1 Tex. Ct. of App., Civ., § 997 (1881); McDougall v. Waddell, 28 Up. Can. C. P., 191 (1877); see, also, Godfrey v. Brown, 86 Ill., 454, 455 (1877); Heard v. Fairbanks, 46 Mass., 111 (1842); Johns v. Kamarad, 96 N. W., 118 (Neb., 1901); Tipton v. Martzell, 21 Wash., 273 (1899).]

And the purchaser thereof at execution sale may maintain trespass to personal chattels against one who tortiously severs the corn from the stalks. Brittain v. McKay (*supra*). [See, *post*, p. *425.]

[A growing crop can be seized as a movable. Pickens v. Webster, 31 La. Ann., 870, 875 (1879).]

[An unripe growing crop is personal property subject to attachment under the statute. Raventas v. Green, 57 Cal., 254, 255 (1881).]

[Growing crops are "goods and chattels" within 9 Anne, c. 8, s. 1, and not liable to be taken in execution against a tenant unless the creditor pays to the landlord the rent due. Allen v. Lloyd (1851), 2 Irish Com. Law, 53.]

[But see Burleigh v. Piper, 51 Iowa, 649, 652 (1879), where it is said: "A levy of an execution upon an unripe and growing crop is not valid as against subsequently acquired liens, if made so long before the officer can properly proceed to advertise and sell as to evince an intention on the part of the judgment creditor to hold the levy for a time merely as security, and especially if it is reasonably certain at the time of the issuance of the writ that it can not be fully executed by the sale of the

the land demised.[12] And under the statute it is held that trees, shrubs and plants growing in a nursery ground, cannot be distrained for rent, the word "product" in the 8th section of the statute being confined to products of a similar nature with those specified in that section, to all of which the process of becoming ripe, and of being cut, gathered, made, and laid up when ripe, was incidental.[13]

Growing crops, of the species known as *frustus industriales,* may also be sold, or mortgaged by their owners as chattels.[14]

crop during the life of the writ." Also Ellithorpe v. Reidesil, 71 Iowa, 315, 317 (1887). While crops are immature, they constitute a part of the realty, and can not be levied upon and sold on execution as personal property.]

[Crops are exempted in Alabama Code, 1896, §§ 1891, 1921; Gaston v. Marengo Imp. Co., 36 So., 738, 739 (Ala., 1904); Evans v. Lamar, 21 Ala., 333, 335 (1852). Also in Georgia, by § 3642, before maturity. Scolley v. Pollock, 65 Ga., 339, 340 (1880); unless the debtor has absconded. Scott v. Russell, 72 Ga., 35, 37 (1883). In Kentucky, by Art. 13, Chap. 38, of the statutes, corn is treated as personalty and subject to levy and sale after October first, so as to give it time to mature. Moreland v. Myall, 77 Ky., 474, 478 (1879). But an attachment upon a growing crop before October first may be obtained in equity. Farmers' Bank v. Morris, 79 Ky., 157, 159 (1880).]

[Crops upon land set apart as a homestead are exempt from levy. Cox v. Cook, 46 Ga., 301, 302 (1872); even though mature, if unsevered. Coates v. Caldwell, 71 Tex., 19, 21 (1888); Bailey v. Oliver, 9 S. W., 606 (Tex., 1888); Alexander v. Holt, 59 Tex., 205, 206 (1883); Parker v. Hale, 78 S. W., 555 (Tex. Civ. App., 1903); Allen v. Ashburn, 27 Tex. Civ. App., 239, 242 (1901); Phillips v. Warner, 4 Ct. App., Civ. Cas., § 147 (Tex., 1890); Cunningham v. Coyle, 2 Tex. Ct. App., Civ. Cas., § 423 (1884). See, also, Sparrow v. Pond, 49 Minn., 412, 419 (1892). And they do not lose their exempt character by being wrongfully impounded and severed. Stagg v. Piland, 31 Tex. Civ. App., 245, 247 (1903).]

[12] See Miller v. Green, 8 Bing., 92, 107 (1831); s. c., 2 Tyr., 1, 14; 2 C. & J., 142, 162. [See, *post,* p. *361.]

[13] Clark v. Gaskarth, 8 Taunt., 431 (1818); Clark v. Calvert, 8 Taunt., 742 (1819).

[14] Wintermute v. Light, 46 Barb., 278 (1866); Northern v. The State, 1 Ind., 113 (1848); Bricker v. Hughes, 4 Ind., 146 (1853); Graff v. Fitch, 58 Ill., 373 (1871); Cook v. Steel, 42 Tex., 58 (1875). See, also, Adams v. Tanner, 5 Ala., 740 (1843); Brown v. Turner, 60 Mo., 21 (1875). [Robinson v. Mauldin, 11 Ala., 977, 980 (1847); Citizens' Bank v. Wiltz, 31 La. Ann., 244 (1879); Crapo v. Seybold, 36 Mich., 444, 445 (1877); Nye v. Patterson, 35 Mich., 413, 414 (1877); State v. Williams, 32 Minn., 537, 539 (1884); Glass v. Blazer, 91 Mo. App., 564, 569 (1901); Swafford v.

In Weatherly v. Higgins,[15] a charge that growing corn was not susceptible of delivery, was held misleading, and it was there said that growing corn can be as easily delivered as any other article of commerce.[16] A chattel mortgage can, however, operate only upon property in actual existence at the time of its execution. And in Comstock v. Scales,[17] this doctrine was ap-

Spratt, 93 Mo. App., 631, 634 (1902); Cudworth v. Scott, 41 N. H., 456, 464 (1860); Sexton v. Breese, 135 N. Y., 387 (1892), aff'g 64 Supr. Ct. (57 Hun), 1, 3 (1890); Harder v. Plass, 64 Supr. Ct. (57 Hun), 540, 542 (N. Y., 1890); Shaw v. Bowman, 91 Pa. St., 414, 417 (1879); Carson v. Browder, 70 Tenn., 701, 702 (1879); Cameron v. Gibson, 17 Ont., 233, 238 (1889); see, also, Forsyth Mfg. Co. v. Castlen, 112 Ga., 199, 201 (1900); Schweinber v. Great West. Elev. Co., 9 N. Dak., 113 (1899).]

[Under the California Civil Code, growing crops can only be mortgaged by the land-owner as chattels; and, as against third parties, they are not covered by a mortgage of the land. Simpson v. Ferguson, 112 Cal., 180 (1896).]

[A crop of cotton after maturity is personal property within § 4600 of the code prohibiting a mortgagor of personal property from disposing of the same without the consent of the mortgagee; and, *semble*, it is likewise before maturity. Hamilton v. State, 94 Ga., 770, 772 (1894); but in Hardeman v. State, 16 Tex. App., 1 (1884), under a similar statute, it was held that a growing crop was not "movable" property until ready to be harvested.]

[Under the Code, a privilege for supplies furnished for crops, is a privilege upon movables and does not require registration. Weil v. Kent, 52 La. Ann., 2139, 2144 (1900).]

[15] 6 Ind., 75 (1854).

[There can not be a present delivery of growing crops. Branton v. Griffits (1877), 2 C. P. D., 212, aff'g 1 C. P. D., 349.]

[16] See, also, Byassee v. Reese, 34 Met. (Ky.), 372 (1863); Graff v. Fitch, 58 Ill., 373 (1871), where in order to designate and set apart the corn sold from the remainder of the field, the parties cut off the tops of one row of the standing corn for a considerable distance in from the fence. See (*post*) Stat. Frauds [and, *post*, p. *267. See, also, Thompson v. Wilhite, 81 Ill., 356, 358 (1876); Smith v. Champney, 50 Iowa, 174 (1878); Swafford v. Spratt, 93 Mo. App., 631, 635 (1902); Avitt v. Farrell, 68 Mo. App., 665, 668 (1896); State v. Durant, 53 Mo. App., 493, 497 (1893); State v. Casteel, 51 Mo. App., 143, 145 (1892); Lyle v. Shinnebarger, 17 Mo. App., 66, 73 (1885); Doremus v. Howard, 23 N. J. Law, 390, 392 (1852). In case of the sale of standing crops, the possession is in the buyer until it is time to harvest them, and until then he is not required to take manual possession of them. Ticknor v. McClelland, 84 Ill., 471, 473 (1877).] See, however, Lawson v. Patch, 5 Allen, 586 (1863).

[17] 7 Wis., 159 (1858).

*plied to the case of a chattel mortgage given upon [*265] "oats, wheat and corn [the property in dispute] at or about the time the same were planted and before the same were up or presented the appearance of growing grain;" and it was considered that the crop, the subject matter of the chattel mortgage, could not be said to be in existence, and the subject matter of the chattel mortgage not being in existence, there was nothing for the mortgage to operate upon.[18]

[18] But where a person, having a right to the use of a parcel of land, a fallow, for the purpose of raising a crop of wheat, executed a chattel mortgage upon his interest in the fallow, the mortgage was held to bind his interest in the fallow and the wheat afterwards raised thereon in the exercise of that right. Shuart v. Taylor, 7 How. Pr., 251 (1852). This was not, however, the case of a mortgage of property which the mortgagor did not own at the time, but one of a mortgage upon an interest in property which then belonged to the mortgagor; and the wheat subsequently sowed might well be bound by the mortgage of the interest in the land. This case is therefore to be distinguished from Comstock v. Scales. The case of Comstock v. Scales, however, if properly ruled (as to which *quaere*), seems to carry the doctrine to its extreme limit. See next note.

See, also, Hutchinson v. Ford, 9 Bush, 318 (1872); s. c., 15 Am. Rep., 711; Milliman v. Neher, 20 Barb., 37 (1855); Bank of Lansingburgh v. Crary, 1 Barb., 542, 551 (1847); Bellows v. Wells, 36 Vt., 602 (1864).

[A mortgage of a future crop is valid if the mortgagor has a possessory interest in the land upon which it is to be grown, even though the land is not yet plowed, as such crop has a potential existence. Thrash v. Bennett, 57 Ala., 156, 161 (1876); Jones v. Webster, 48 Ala., 109, 112 (1872); Brown v. Coats, 56 Ala., 439, 444 (1876); Wilkerson v. Thorp, 128 Cal., 221, 226 (1900); Arques v. Wasson, 51 Cal., 620, 624 (1877); Wheeler v. Becker, 68 Iowa, 723 (1886); Ambuehl v. Matthews, 41 Minn., 537, 540 (1889); Miller v. McCormick Mach. Co., 35 Minn., 399 (1886); Minnesota Linseed Oil Co. v. Maginnis, 32 Minn., 193, 195 (1884); Russell v. Stevens, 70 Miss., 685, 687 (1893); Cumberland Nat. Bank v. Baker, 57 N. J. Eq., 231 (1898); Rawlings v. Hunt, 90 N. C., 270, 272 (1884); Harris v. Jones, 83 N. C., 317, 322 (1880); Womble v. Leach, 83 N. C., 84, 90 (1880); Cotten v. Willoughby, 83 N. C., 75, 78 (1880); Rountree v. Britt, 94 N. C., 104, 108 (1886); Kimball v. Sattley, 55 Vt., 285, 290 (1883); Grass v. Austin, 7 Up. Can. App., 511, 514 (1882).]

[A mortgage of crops to be grown during five years is valid as against execution-creditors, as the lien of the mortgage attaches as soon as the crops come into existence. Headrick v. Brattain, 63 Ind., 438 (1878); but in Loftin v. Hines, 107 N. C., 360 (1890), it is said that, upon grounds of public policy, a mortgage of all crops "hereafter to be cultivated" is invalid as to crops which are raised after the one planted or about to be planted at the time of the execution of the mortgage.]

[Under the Alabama Code, § 1064, a mortgage of an unplanted crop, executed on or after the first day of January of the year in which such crops are grown, conveys the legal title thereto. Shows v. Brantley, 127 Ala., 352, 354 (1899). Under Arkansas act of February 11, 1875, a mortgage on crops to be grown is valid. Senter v. Mitchell, 16 Fed., 206, 207 (U. S. C. C., 1883); Jarratt v. McDaniel, 32 Ark., 598, 603 (1877).]

[A mortgage of a crop afterwards to be planted, being of personalty, may be made without writing. Stearns v. Gafford, 56 Ala., 544, 545 (1876).]

In Bagshaw v. Farnsworth, 2 L. T. (N. S.), 390 (1860), *quaere* whether a sheriff could seize and sell crops of seed sown, before they were sprung up. Pollock, C. B.: "The seed sown or planted in the ground, it is said, is not yet above the earth; but under the name of a growing crop how can you take a possibility? A growing crop one would suppose to mean something appearing above the ground and to be growing, and not the seed dying before it becomes the new plant." See, however, *contra*, Andrew v. Newcomb, 32 N. Y., 417 (1865); Hob., 132; Cook v. Steel, 42 Tex., 58 (1875), where it was said that the cotton having been planted before the date of the contract its growth towards maturity at that time could not be material as affecting the right to dispose of it by the mortgage.

[A crop, after the seed is sown, has an actual as well as a potential existence, and passes under a chattel mortgage. Crine v. Tifts, 65 Ga., 644, 646 (1880); Stephens v. Tucker, 55 Ga., 543, 544 (1875); Hansen v. Dennison, 7 Ill. App., 73, 77 (1880); Cudworth v. Scott, 41 N. H., 456, 461 (1860); Ayers v. Hawk, 11 Atl., 744, 745 (N. J. Ch., 1887); Laing v. Ontario Loan Co., 46 Up. Can. Q. B., 114, 125 (1881).]

[A mortgage may be made on a growing crop; and a crop must be treated as growing from the time the seed is deposited in the ground, as at that time it loses its qualities as a chattel, and becomes part of the freehold. Wilkinson v. Ketler, 69 Ala., 435, 440 (1881).]

[Under § 315, C. 66, Minnesota Gen. Stat., 1878, a levy may be made upon grain or grass while growing; and, under this section, if the grain has sprouted, it is not necessary that the growth should have extended above the top of the soil. Gillitt v. Truax, 27 Minn., 528, 529 (1881).]

[It will be assumed that, according to the course of husbandry crops have been planted prior to May twenty-sixth. Cotten v. Willoughby, 83 N. C., 75, 78 (1880).]

[Courts will take judicial notice of the seasons, and of the general course of agriculture, and will take notice that a crop of cotton, upon which a mortgage was intended to operate, was not planted at the date of the recording of the mortgage, January twenty-ninth. Tomlinson v. Greenfield, 31 Ark., 557, 558 (1876). But, *quaere*, will courts take judicial notice that a crop of wheat has been severed from the soil before November seventeenth. State v. Williams, 32 Minn., 537, 539 (1884).]

Growing crops also pass under the assignment to the assignee in bankruptcy of the owner of the land, and should be placed by the bankrupt upon his schedule of personal property.[1]

They are also so far regarded as personal property as to authorize an action of trespass before a justice of the peace for an injury thereto, where the damages claimed are within the jurisdiction of that court, although by statute that court has *no jurisdiction of actions of trespass to realty.[2] Trover [*266] also lies for their severance and conversion.[3] So, ripe corn standing upon the stalk and not severed therefrom nor from the land, may be recovered in replevin under the statute for the recovery of personal property.[4]

1 *In re* Schumpert, 8 Nat. Bank Reg., 415 (1873). [*Re* Barrow, 98 Fed., 582, 583 (U. S. Dist. Ct., Va., 1899). Nor is the rule different as to crops growing upon a homestead in voluntary bankruptcy. *Re* Daubner, 96 Fed., 805, 806 (U. S. Dist. Ct., Ore., 1899); *Re* Hoag, 97 Fed., 543 (U. S. Dist. Ct., Wis., 1899). See, also, *Re* Coffman, 93 Fed., 422 (U. S. Dist. Ct., Tex., 1899).]

[Wheat growing upon a homestead, is a part thereof, and does not pass to an assignee in insolvency. Dascey v. Harris, 65 Cal., 357 (1884).]

2 Reed v. Johnson, 14 Ill., 257 (1852). The court below in this case held that a justice of the peace had no jurisdiction on the ground that the growing corn was real estate and that under the statute justices of the peace had jurisdiction only in actions of trespass to personal property. See, also, Brittain v. McKay, 1 Ired. Law, 265 (1840).

[In an action of trespass *quare clausum fregit*, an allegation of the destruction of personal property is sustained by evidence of the destruction of a crop of potatoes. Salimonie Mining Co. v. Wagner, 2 Ind. App., 81, 83 (1891).]

[Where the jurisdiction of justices of the peace over actions arising *ex delicto* is confined to "cases of injuries or damages to personal property" he has no jurisdiction of an action for damages for burning an immature crop and grass growing upon land belonging to the owner of the crops. Bagley v. Columbus R'y Co., 98 Ga., 626 (1896).]

3 Dunne v. Ferguson, Hayes, 540 (1832). [See, *post*, p. *430. Mueller v. Olson, 90 Minn., 416, 417 (1903); McKay v. Pearson, 6 Pa. Super., 529, 535 (1898).]

4 Mattock v. Fry, 15 Ind., 483 (1860). [Baker v. McInturff, 49 Mo. App., 505, 506 (1892).]

[Replevin will lie for ungathered corn standing in the field, especially if admitted to be mature at the time of bringing the action. Salmon v. Fewell, 17 Mo. App., 118, 126 (1885).]

Fructus industriales have also been held to be chattels within the meaning of the registry laws.[5]

There has been considerable confusion among the authorities with reference to the effect of the 4th section of the Statute of Frauds[6] upon contracts for the sale of vegetable products growing in or upon the land. With reference, however, to sales of growing crops (*fructus industriales*) raised annually by labor, industry and manurance, as distinguished from trees, grass, and other spontaneous growths (*prima vestura*), the clear weight of authority seems now to be that they are not contracts or sales of lands, tenements, or hereditaments or any interest in or concerning them within said section, and hence need not be in writing.[7] But if it is a part of the contract

[Annual crops are the subject of repleviu whether growing or matured, and courts take judicial notice that certain crops mature at certain seasons [in this case, December]. Garth v. Caldwell, 72 Mo., 622 (1880).]

[5] Robinson v. Ezzell, 72 N. C., 231 (1875). So held in this case in a controversy with the register who was entitled to a fee of 80 cts. for recording the instrument, if the "corn crop" was real estate; but only 20 cts. for registration thereof, if the instrument was a chattel mortgage.

[6] 29 Chas. 2, c. 3 (*anno*, 1676).

[7] See Northern v. The State, 1 Ind., 113 (1848); Bricker v. Hughes, 4 Ind., 146 (1853); Sherry v. Picken, 10 Ind., 375 (1858); Newcomb v. Ramer, 2 John., 421, note (1807); Austin v. Sawyer, 9 Cow., 39 (1828); Westbrook v. Eager, 16 N. J. Law, 81 (1837); Bull v. Griswold, 19 Ill., 631 (1858); Bryant v. Crosby, 40 Me., 21 (1855); Marshall v. Ferguson, 23 Cal., 65 (1863); Davis v. McFarlane, 37 Cal., 634 (1869); Kingsley v. Holbrook, 45 N. H., 313 (1864); Dunne v. Ferguson, Hayes, 540 (1832); Evans v. Roberts, 5 B. & C., 829 (1826); Jones v. Flint, 10 Ad. & E., 753 (1839); s. c., 2 P. & D., 594; Sainsbury v. Matthews, 4 M. & W., 343 (1838). See, also, Browne on Stat. of Frauds, § 237, *et seq.*, and cases there cited; also cases cited *post*, p. *269, note (14). [Nuernberger v. Von Der Heidt, 39 Ill. App., 404, 405 (1890); Dayton v. Dakin, 103 Mich., 65, 73 (1894); Holt v. Holt, 57 Mo. App., 272 (1894); see, also, Smock v. Smock, 37 Mo. App., 56 (1889). But see Kerr v. Hill, 27 W. Va., 576, 605 (1886).]

It is immaterial so far as regards this question whether at the time of making the contract the product is matured or still growing. See Warwick v. Bruce, 2 M. & S., 205 (1813); Evans v. Roberts, 5 B. & C., 829 (1826); Sainsbury v. Matthews (*supra*); Jones v. Flint, 10 Ad. & E., 753 (1839); Bryant v. Crosby, 40 Me., 21 (1855); Westbrook v. Eager, 16 N. J. Law, 81 (1837); Browne on Stat. Frauds, § 246, and the cases above cited. See also, Tripp v. Hasceig, 20 Mich., 254 (1870). See, however, Parker v.

*that the purchaser of the crop shall have the beneficial [*267] use of the soil of the vendor in the interval of time between the contract of sale and delivery of the crop, for the purpose of raising such crop which when mature is to belong to the purchaser, the case is otherwise, and the contract is for an interest in the land. The mere fact, however, that the crop purchased may or will incidentally receive nourishment from the soil of the vendor in the said interval of time, is not conclusive of the question, where the beneficial use or possession of the land whereon the crop is growing is not contracted for.[8]

Sales of growing crops seem, however, to be conceded to be contracts for the sale of goods, wares and merchandise, within the 17th section of said statute.[9]

Staniland, 11 East, 362 (1809); Powell v. Rich, 41 Ill., 466 (1866). [Cutler v. Pope, 13 Me., 377, 380 (1836).]

[Growing hops, produced by annual cultivation, are subject to sale as personal property. Frank v. Harrington, 36 Barb., 415, 420 (N. Y., 1862); likewise, timothy, Hosli v. Yokel, 57 Mo. App., 622, 625 (1894); fruit growing on trees. Vulicevich v. Skinner, 77 Cal., 239, 240 (1888); and nursery trees. McIntosh v. McLeod, 6 Nova S. L. R., 128, 133 (1886).]

[A chattel mortgage of a crop may be made without writing. Stearns v. Gafford, 56 Ala., 544, 545 (1876); Gafford v. Stearns, 51 Ala., 434, 443 (1874).]

[As to verbal reservations of a growing crop from a conveyance of land, see, *ante*, p. *252.]

[8] See Evans v. Roberts, 5 B. & C., 829 (1826); Warwick v. Bruce, 2 M. & S., 205 (1813); Jones v. Flint, 10 Ad. & E., 753 (1839); Sainsbury v. Matthews, 4 M. & W., 343 (1838); Crosby v. Wadsworth, 6 East, 602 (1805).

See the whole subject considered at considerable length in Browne on Stat. Frauds, §§ 247, 248, *et seq.*

[A parol lease for one year with an agreement that the tenant may enter after the expiration of the lease and reap the crop, is void under the Statute of Frauds, its effect being to extend the lease into the second year, and the right to enter and reap being an interest in land. Upon the tenant's leaving the premises, paying no rent, the landlord can take possession of the crops. Carney v. Mosher, 97 Mich., 554 (1893).]

[9] Watts v. Friend, 10 B. & C., 446 (1830); Bowman v. Conn, 8 Ind., 58 (1856); Sherry v. Picken, 10 Ind., 375 (1858); Dunne v. Ferguson, Hayes, 540 (1832). See, also, Smith v. Bryan, 5 Md., 141 (1853); Crosby v. Wadsworth, 6 East, 602 (1805).

See, however, Waddington v. Bristow, 2 B. & P., 452 (1801); Crosby v. Wadsworth, 6 East, 602 (1805).

Growing periodical crops (*fructus industriales*), are not, however, while growing and until ready for the harvest, goods and chattels within the meaning of the Statutes concerning Fraudulent Conveyances and Contracts, of which a sale in order to be valid as against the creditors of a vendor, must be accompanied by an immediate delivery and followed by an actual and continued change of possession.[10]

[*268] *With reference to contracts for the sale of trees, grass, and other spontaneous productions (*prima vesiura*) of the earth, there is considerable diversity of authority as to when such sales are within the 4th section of the Statute of Frauds. One class of authorities lays down the rule, "that, if sold specifically, and to be by the terms of the contract delivered separately and as chattels, such a contract of sale is not affected by the fourth section of the statute, as amounting to a sale of any in-

[In a division of growing crops between tenants in common thereof such crops are classed as personal property. Reynolds v. Reynolds, 55 Supr. Ct. (48 Hun), 142, 144 (N. Y., 1888).]

[10] See Davis v. McFarlane, 37 Cal., 634 (1869); Bours v. Webster, 6 Cal., 660 (1856); Bernal v. Hovious, 17 Cal., 541 (1861); Bellews v. Wells, 36 Vt., 599 (1864); Robbins v. Oldham, 1 Duvall, 28 (1863). See, also, Visher v. Webster, 13 Cal., 58 (1859); Pacheco v. Hunsacker, 14 Cal., 120 (1859); Fry v. Miller, 45 Penn. St., 441 (1863); Groff v. Fitch, 58 Ill., 373 (1871); Weatherly v. Higgins, 6 Ind., 75 (1854); Fitch v. Burk, 38 Vt., 683 (1866); Sterling v. Baldwin, 42 Vt., 311 (1869). [See, *ante*, p. *264. See, *contra*, Smith v. Champney, 50 Iowa, 174 (1878); State v. Durant, 69 Mo. App., 390, 394 (1896).]

[*Fructus industriales* are not within the Statute of Frauds, and an agreement of sale thereof need not be recorded. Carson v. Browder, 70 Tenn., 701, 702 (1879).]

[Where a transfer of land is void for want of a writing, a transfer of wheat inseparably connected with it, is void also. Jackson v. Evans, 44 Mich., 510, 513 (1880).]

The Statute of California, referred to in the text (sec. 15 of an act entitled "An Act Concerning Fraudulent Conveyances and Contracts," passed April 19, 1850. 1 Hittell's Gen. Laws of Cal., § 3159), is as follows: "Every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of things sold or assigned, shall be conclusive evidence of fraud as against the creditors of the vendor, or the creditors of the person making such assignment or subsequent purchasers in good faith."

terest in the land;" and these authorities make no distinction in this respect between spontaneous growths, or those raised by periodical cultivation. The rule is thus stated by Mr. Browne in his work on the Statute of Frauds[11] as being the more approved and satisfactory rule to be deduced from the authorities.[12]

*Another class of cases, however, makes a distinction [*269] between trees, grass and other spontaneous productions, and growing crops of grain, vegetables, etc., produced annually by labor, cultivation and manurance; and determines the question

[11] Sec. 237, *et seq.*

[12] See, however, sec. 250, where the learned author admits that the doctrine supported by the text has attracted much favor of late years. The reader is referred to Mr. Browne's valuable work for a full presentation of his view of the law and the cases supporting it, into which it would be foreign to the purpose of this volume to enter more at length. See, also, Smith v. Surman, 9 B. & C., 561 (1829); Marshall v. Green, L. R. 1 C. P. D., 35 (1875); s. c., 45 L. J. C. P., 153; Lee v. Gaskell, 45 L. J. (Q. B. D.), 540 (1876), per Cockburn, C. J.; 1 Ld. Raym., 182; Cain v. McGuire, 13 B. Mon., 340 (1852); Byassee v. Reese, 4 Met. (Ky.), 372 (1863); Whitmarsh v. Walker, 1 Met., 313 (1840); Nettleton v. Sikes, 8 Met., 34 (1844); Clafflin v. Carpenter, 4 Met., 580 (1842); Smith v. Bryan, 5 Md., 141 (1853); Purner v. Piercy, 40 Md., 212 (1874); Erskine v. Plummer, 7 Me., 447 (1831); Huff v. McCauley, 53 Penn. St., 206 (1866); Yeakle v. Jacob, 33 id., 376 (1859); McClintock's Appeal, 71 id., 365 (1872); Pattison's Appeal, 61 id., 294 (1869). [See Wiggins v. Jackson, 24 Ky. Law R., 2189, 2190 (1903); Tilford v. Dotson, 21 Ky. Law R., 333, 335 (1899); Asher Lumber Co. v. French, 18 Ky. Law R., 682, 683 (1896); Cardwell v. Atwater, 15 Ky. Law R., 570, 572 (1894); Hunter v. Burchett, 5 Ky. Law R., 770 (1884); Sproule v. Hopkins, 4 Ky. Law R., 533 (1882); Banton v. Shorey, 77 Me., 48, 51 (1885); Leonard v. Medford, 85 Md., 666, 672 (1897); Douglas v. Shumway, 79 Mass., 498, 502 (1859); Kirkeby v. Erickson, 90 Minn., 299 (1903); Avitt v. Farrell, 68 Mo. App., 665, 668 (1896); Robbins v. Farwell, 193 Pa. St., 37, 44 (1899); Bowers v. Bowers, 95 Pa. St., 477, 480 (1880); Wilson v. Irvin, 1 Pennypacker, 203, 208 (Pa., 1881); Fish v. Capwell, 18 R. I., 667, 670 (1894); Handy v. Carruthers, 25 Ont., 279, 280 (1894); Summers v. Cook, 28 Gr. Ch., 179 (Ont., 1880).]

The Pennsylvania cases above referred to, while recognizing the distinction between spontaneous productions and crops produced by labor, etc., also make a distinction between contracts for the sale of timber contemplating an immediate severance thereof and those which do not, holding the latter to be within the statute, and the former not. [See Commissioners of Taxes v. Kauri Timber Co., 17 N. Z., 696, 710 (1899).]

of the applicability of the statute upon this distinction, holding, as above stated, verbal contracts for the latter[13] (which, as we have seen, are in most respects considered to be chattels) to be valid, and verbal contracts for the former (which, as has been seen, are considered as passing to the heir as part of the realty and not to the executor) to be invalid. This rule, while having the merit of simplicity and ease of application, is believed also to be more in harmony with the principles already laid down in this chapter as governing these species of property; and it is also believed to be supported by the weight of modern authority,[14] though there are well considered cases supporting the rule first laid down.[15]

[13] With the limitation, of course, that they do not come within the prohibition of the 17th section. [See, *ante*, p. *267.]

[14] See Green v. Armstrong, 1 Den., 550 (1845); McGregor v. Brown, 10 N. Y., 117 (1854); Pierrepont v. Barnard, 5 Barb., 364 (1849); Goodyear v. Vosburg, 57 Barb., 243 (1869); s. c., 39 How. Pr., 377; Warren v. Leeland, 2 Barb., 614 (1847); McIntyre v. Barnard, 1 Sandf. Ch., 52 (1843); Buck v. Pickwell, 27 Vt., 157 (1855); Kingsley v. Holbrook, 45 N. H., 313 (1864); Hobbs v. Wetherwax, 38 How. Pr., 388 (1868); Vorebeck v. Roe, 50 Barb., 305 (1867); Howe v. Batchelder, 49 N. H., 204 (1870); Putney v. Day, 6 N. H., 430 (1833); Olmstead v. Niles, 7 N. H., 522 (1835); Owens v. Lewis, 46 Ind., 488 (1874), where the cases are fully collected; Evans v. Roberts, 5 B. & C., 829 (1826); Scorell v. Boxall, 1 Y. & J., 396 (1827); Teal v. Auty, 2 B. & B., 99 (1820). See, also, Liford's Case, 11 Co., 46 b (1614); s. c., 1 Rolle, 95; Tottell v. Howell, Noy, 54; Boisaubin v. Reed, 2 Keyes, 323 (1866); Slocum v. Seymour, 36 N. J. Law, 138 (1873); Pattison's Appeal, 61 Penn. St., 294 (1869); Giles v. Simonds, 15 Gray, 441 (1860); Fitch v. Burk, 38 Vt., 687 (1866); Sterling v. Baldwin, 42 Vt., 308 (1869); Stearns v. Washburn, 7 Gray, 188 (1856); Lawson v. Patch, 5 Allen, 586 (1863); 7 Gray, 190; 13 Alb. Law Jour., 70, and cases there cited. [See Heflin v. Bingham, 56 Ala., 566, 574 (1876); Jenkins v. Lykes, 19 Fla., 148, 158 (1882); Douglas v. Bunn, 110 Ga., 159, 162 (1899); Morgan v. Perkins, 94 Ga., 353, 355 (1894); Hostetter v. Auman, 119 Ind., 7, 12 (1888); Armstrong v. Lawson, 73 Ind., 498, 500 (1881); Terrell v. Frazier, 79 Ind., 473, 476 (1881); Garner v. Mahoney, 115 Iowa, 356, 357 (1902); Smith v. Leighton, 38 Kan., 544, 546 (1888); Powers v. Clarkson, 17 Kan., 218, 220 (1876); Williams v. Flood, 63 Mich., 487 (1886); Kileen v. Kennedy, 90 Minn., 414 (1903); Walton v. Lowrey, 74 Miss., 484 (1896); Harrell v. Miller, 35 Miss., 700 (1858); Nelson v. Lawson, 71 Miss., 819, 820 (1894); Alt v. Grosclose, 61 Mo. App., 409, 412 (1895); Drake v. Howell, 133 N. C., 162 (1903); Hirth v. Graham, 50 Ohio St., 57 (1893); Clark v. Guest, 54 Ohio St., 298, 302 (1896); Miller v. Zufall, 113 Pa. St., 317, 323 (1886);

*While, as above stated, the correct rule seems to be, [*270] that growing trees, grass and other spontaneous products, are parcel of the realty, and a conveyance of them is a conveyance of an interest in lands and within the Statute of Frauds, still they may, when such is the intention of the parties, be severed in law from the land and become personal property without an actual severance; as where the owner of the land by a valid deed of conveyance in writing sells the trees or grass to a third person, or where he sells the land reserving the trees or grass. In both these cases the trees or grass, when such appears to be the intention[16] of the parties, become chattels distinct from the soil, and thereafter go to the executor instead of the heir; they may also thereafter be transferred by parol, for in contemplation of law they are abstracted from the earth.[17]

Knox v. Haralson, 2 Tenn. Ch., 232, 237; Cady v. Sanford, 53 Vt., 632, 636 (1881); Fluharty v. Mills, 49 W. Va., 446 (1901); Mississippi Logging Co. v. Miller, 109 Wis., 77, 84 (1901); McMillen v. Pratt, 89 Wis., 612, 631 (1895); Lillie v. Dunbar, 62 Wis., 198, 202 (1885); Daniels v. Bailey, 43 Wis., 566 (1878); Bruley v. Garvin, 105 Wis., 625, 629 (1900); Seymour v. Cushway, 100 Wis., 580, 590 (1898).]

[A reservation of trees by the grantor of land, can not be made by parol. Dodder v. Snyder, 110 Mich., 69, 70 (1896).]

So, in Rodwell v. Phillips, 9 M. & W., 501 (1842), it was *held*, that an agreement for the sale of fruit growing upon trees was an agreement for the sale of an interest in land, and required a stamp, if the interest was of the value of £20.

[A deed of growing timber conveys land within the meaning of the registry laws; and, if duly recorded, is admissible in evidence without proof of execution. McRae v. Stillwell, 111 Ga., 65, 72 (1900). An assignment in conditional form of a permit to cut and remove standing trees need not be recorded as a chattel mortgage. Putnam v. White, 76 Me., 551, 555 (1884).]

[15] See *ante*, p. *268, note (12).

[16] See McClintock's Appeal, 71 Penn. St., 365 (1872); Clap v. Draper, 4 Mass., 266 (1808); Knotts v. Hydrick, 12 Rich., 314 (1859); Rich v. Zeilsdorff, 22 Wis., 544 (1868). [Robbins v. Farwell, 193 Pa. St., 37, 45 (1899); see, also, Cooley v. Kansas City, &c., R. R. Co., 149 Mo., 487, 493 (1899); Billings v. Billings, 1 Pennypacker, 145, 152 (Pa., 1881); and, *ante*, p. *45.]

[17] Bank of Lansingburg v. Crary, 1 Barb., 542 (1847); Warren v. Leeland, 2 Barb., 613 (1847); Kingsley v. Holbrook, 45 N. H., 313 (1864); McIntyre v. Barnard, 1 Sandf. Ch., 52 (1843); Liford's Case, 11 Co., 46 b (1614); s. c., 1 Rolle, 95; and the cases therein cited. [See, *ante*, p. *248. See, however, Potter v. Everett, 40 Mo. App., 152 (1890).]

[Where trees are counted, marked and sold to be cut and removed, a deed executed by the seller is a bill of sale of personalty; and an express warranty of title therein is personal merely and not a covenant running with the trees to a sub-buyer. Asher Lumber Co. v. Cornett, 22 Ky. Law R., 569, 570 (1900).]

In Warren v. Leeland (*supra*), it is stated that simultaneously with the execution and delivery of the conveyance, the trees are severed, in the law, from the earth, and become chattels personal; and the interest which passes is not a freehold estate, but an interest in perpetuity in personal estate; and the doctrine is thence deduced, that a contract of sale or conveyance of growing trees is, therefore, not within the recording act and need not be recorded in order to protect it against a subsequent *bona fide* purchaser, without notice, of the land on which the timber stands; and hence where the owner of land sells the trees growing thereon and afterwards conveys the land without any exception or reservation, the title to the trees will not pass. In this case, however, the subsequent purchaser of the land had notice of the existence of the previous sale of the timber, before he received his deed. And in the subsequent and well considered case of Vorebeck v. Roe, 50 Barb., 302 (1867), where the question arose directly, a contrary decision was made, so that the rule above stated in Warren v. Leeland is believed not to be the law. See, also, Byassee v. Reese, 4 Met. (Ky.), 372 (1863); Goodyear v. Vosburg, 57 Barb., 246 (1869); Gardiner Manf'g Co. v. Heald, 5 Me., 381 (1828); Wescott v. Delano, 20 Wis., 514 (1866).

[A landowner by sealed contract sold the standing wood thereon, with two years in which to remove same. The landowner then conveyed the land to one with knowledge of the contract. *Held*, that this contract was a license, and revoked by the conveyance, the grantee being entitled to the trees upon the land. Fish v. Capwell, 18 R. I., 667, 672 (1894).]

A notice to the grantee of land on which is standing timber sold to another, that such timber belongs to such third person, is said to be as effectual as an exception in a deed. Safford v. Annis, 7 Me., 168 (1830). [See Kendall v. Porter Lumber Co., 69 Ark., 442, 447 (1901); Lockeshan v. Miller, 16 Ky. Law R., 55 (Super., 1894); Russell v. Myers, 32 Mich., 522, 523 (1875); Johnson v. Moore, 28 Mich., 3, 7 (1873); Sanford v. Eastabutchie Lumber Co., 36 So., 10, 11 (Miss., 1904); O'Hanlon v. Murdock [1901] 1 I. R., 122, 128. Actual and open possession of land by a grantee of the trees thereon under an unrecorded deed, is notice to a subsequent purchaser of the land as to the ownership of the trees. Bolland v. O'Neal, 81 Minn., 15, 18 (1900). Where a sale of standing timber is made through an agent of the owner of the land, a subsequent purchase of such land by the agent is an affirmance of the sale of the timber. Jenkins v. Lykes, 19 Fla., 148, 160 (1882).] See, however, Brown v. Dodge, 32 Me., 167 (1850). [Andrews v. Costigan, 30 Mo. App., 29 (1888).]

[An owner of land who had agreed, by an unsealed contract, to sell the timber thereon, conveyed the land, giving oral notice to the grantee, of the outstanding right to the timber. *Held*, that the conveyance without

a reservation in the deed, was a revocation of the contract, and that, as no action would lie by the buyer of the timber against the grantee, the buyer could recover from the grantor for breach of contract. Emerson v. Shores, 95 Me., 237 (1901).]

[Where a contract for the sale of land reserves growing timber to the grantor, but the subsequent deed contains no reservation, the timber passes to the grantee. Clifton v. Jackson Iron Co., 74 Mich., 183 (1889).]

[*271] CHAPTER IX.

OF THE TRANSFER OF FIXTURES BY CONVEYANCE, MORTGAGE, DEVISE, IN CASE OF BANKRUPTCY, ETC.; AND HEREIN OF REGISTRATION, THE STATUTE OF FRAUDS, ETC.

As was stated in a preceding chapter,[1] it is well settled that the rule *quicquid plantatur solo, solo cedit,* is applied with greater rigor in favor of the inheritance, as between executor and heir, than in the relations of landlord and tenant, and tenant for life or in tail and remainderman or reversioner. It is also equally well settled, that in the absence of evidence of specific intention varying the rights of the parties, the same strict rule which prevails between heir and executor, prevails also between the grantor and grantee and mortgagor and mortgagee of the land.[2]

[1] Chap. 6, p. *209.

[2] 21 H. 7, 26 b (1506); Preston v. Briggs, 16 Vt., 128 (1844); Miller v. Plumb, 6 Cow., 665 (1827); Holmes v. Tremper, 20 John., 30 (1822); Laflin v. Griffiths, 35 Barb., 58 (1860); Snedeker v. Warring, 12 N. Y., 174 (1854); Murdock v. Gifford, 18 N. Y., 31 (1858); Tate v. Blackburne, 48 Miss., 1, 9 (1873); Sands v. Pfeiffer, 10 Cal., 258 (1858); Despatch Line of Packets v. Bellamy Manf'g Co., 12 N. H., 205 (1841); Burnside v. Twitchell, 43 N. H., 393 (1861); Lathrop v. Blake, 23 N. H., 64 (1851); Johnson v. Wiseman, 4 Met. (Ky.), 359 (1863); Robinson v. Preswick, 3 Edw. Ch., 246 (1838); Crane v. Brigham, 11 N. J. Eq., 29 (1855); Childress v. Wright, 2 Cold., 352 (1865); DeGraffenreid v. Scruggs, 4 Humph., 451 (1844). [Hereford v. Pusch, 68 Pac. 547 (Ariz., 1902); Adams v. Beadle, 47 Iowa, 439, 441 (1877); Thomas v. Davis, 76 Mo., 72, 76 (1882); Horne v. Smith, 105 N. C., 322, 325 (1890); Wilson v. Steel, 13 Phila., 153 (1879); William Firth Co. v. South Carolina Loan Co., 122 Fed., 569 (U. S. C. C. A., S. C., 1903); see, also, McCrillis v. Cole, 55 Atl., 196, 197 (R. I., 1903).]

So, it seems, whether the mortgagee is in or out of possession, Laflin v. Griffiths (*supra*). [See, *post*, p. *287.]

[At common law, what is accessory to real estate passes with it by alienation. As between vendor and vendee the rule for determining what

is a fixture is always construed strongly against the vendor. Many things pass by deed, although annexed for purposes of trade, manufacture, or for ornament or domestic use, and which, if annexed by a tenant, might be removed. Fratt v. Whittier, 58 Cal., 126, 130 (1881). The law leans to the vendee. Hill v. Mundy, 89 Ky., 36, 38 (1889).]

[*Insurance.*—A policy insuring a building covers an awning or shed erected on posts set in the ground, with rafters extending into the brick wall of the building, and covered with plank. Commercial Ins. Co. v. Allen, 80 Ala., 571, 578 (1886); so, as to a furnace weighing one thousand, five hundred pounds, standing upon a brick foundation specially prepared for it in a cellar, and a boiler attached to pipes for conveying hot-water to the rooms in the house. West v. Farmers' Mut. Ins. Co., 117 Iowa, 147 (1902); so, as to a heater bricked in. Adams v. Greenwich Ins. Co., 16 Supr. Ct. (9 Hun), 45, 49 (N. Y., 1876); so, as to altars in a church. Caraher v. Royal Ins. Co., 70 Supr. Ct. (63 Hun), 82, 96 (N. Y., 1892); so, as to a boiler, elevator machinery, steam piping, radiators, iron tanks, gas-piping and speaking-tube. Thurston v. Union Ins. Co., 17 Fed., 127, 129 (U. S. C. C., N. H., 1883); so, as to engine, boiler, smoke-stack, shafting, gearing, belting and fixed and movable machinery. Carr v. Fire Assurance Ass'n, 14 Ont., 487 (1887). See, also, Brugger v. State Ins. Co., 5 Sawy., 304 (U. S. C. C., Ore., 1879), that a policy of insurance of a mill-building, where the amount is much more than the value of the building, covers the machinery. In British Am. Assurance Co. v. Bradford, 60 Kan., 82 (1898), mill machinery was *held* to be a part of the realty within the "valued-insurance-policy" law.]

[Insurance upon a building covers fixtures therein, although fixtures have been the subject of another policy of insurance. Niagara Ins. Co. v. Heenan, 181 Ill., 575 (1899).]

[A one-story brick, metal-roof warehouse, erected by a tenant under an agreement that it shall remain his property, is real property, making the insurer liable for the full amount in case of total loss. Orient Ins. Co. v. Parlin-Orendorff Co., 14 Tex. Civ. App., 512 (1896). Insurance upon flour-mill machinery is insurance of real property. Havens v. Germania Ins. Co., 123 Mo., 403, 419 (1894).]

[A boiler covered by a brick wall and an engine, all fixed upon a foundation for permanent use in a building, is a "structure" within § 3643 of the Revised Statutes, requiring the insurer to pay the full insured value of the property. Insurance Co. v. Luce, 11 Ohio Circ. Ct., 476 (1896).]

[A policy of insurance provided that the company should not be liable for "store or office furniture or fixtures," and the property insured was described as a "building, including gas, steam and water pipes, and all other permanent fixtures." *Held*, not to cover counters, shelving and fixtures not built into the building, and easily removed. Banyer v. Albany Ins. Co., 85 App. Div., 122 (N. Y., 1903).]

[*Eminent Domain.*—In condemnation proceedings the same strict rule prevails as between grantor and grantee. White v. Cincinnati R. & M.

Questions as to fixtures, arising on a partition between owners of the fee being tenants in common, are also to be decided on the same principle, as if arising between grantor and grantee, or, as if the partition had been effected by mutual deeds of bargain and sale.[3]

R. R., 71 N. E., 276 (Ind. App., 1904); *Re* Mayor of New York, 39 App. Div., 589, 595 (N. Y., 1899).]

[In condemnation proceedings, buildings, improvements, and structures upon the land condemned, pass with it. Stauffer v. Cincinnati, R. & M. R. R. Co., 70 N. E., 543, 544 (Ind. App., 1904); Chicago, I. & K. R. R. Co. v. Knuffke, 36 Kan., 367 (1887); Williams v. Commonwealth, 168 Mass., 364, 366 (1897); Kansas City v. Morse, 105 Mo., 510, 519 (1891); Schuchardt v. Mayor of New York, 53 N. Y., 202, 210 (1873); Finn v. Providence Water Co., 99 Pa. St., 631 (1882).]

[A bay-window is a part of the realty in condemnation proceedings. Williams v. Commonwealth, 168 Mass., 364, 366 (1897); so, as to a corn-crib. Mississippi River Co. v. Ring, 58 Mo., 491, 496 (1874); so, as to sawmill machinery. Lefebvre v. Queen, 1 Exch., 121, 132 (Can., 1884); so, as to a roadbed. VanHusen v. Omaha B. & T. R'y Co., 118 Iowa, 366, 382 (1902). Machinery must be paid for, although removable without injury. White v. Cincinnati, R. & M. R. R., 71 N. E., 276 (Ind. App., 1904).]

[*Jurisdiction.*—A fence is a part of the realty, and not within the jurisdiction of a justice of the peace in an action *ex delicto* for its destruction. Bagley v. Columbus So. R'y Co., 98 Ga., 626, 627 (1896).]

[3] Walker v. Sherman, 20 Wend., 636 (1839); Baldwin v. Breed, 16 Conn., 66 (1843). See, also, Plumer v. Plumer, 30 N. H., 569 (1855); Parsons v. Copeland, 38 Me., 537 (1854). [See Elting v. Palen, 14 N. Y. Supp., 607 (1891).]

But a dye-house without a cellar (near a woolen factory), having in it a copper kettle, iron kettle, washers, fulling stocks, press and shafting, and a dry-house standing on blocks, together with a wood-house, erected upon the common property by one of the tenants in common in possession for his own use, after a co-tenant has filed his petition for a partition, from the character of the buildings, mode of attachment and use for which designed, and in the absence of evidence that they were placed there against the consent of the petitioner, may well be presumed to have been erected rightfully, and do not become the property of the tenants in common, and hence should not be appraised by the commissioners in estimating the value of the entire property, thereby giving to the petitioner a share of their value. Parsons v. Copeland (*supra*).

[In Madison v. Madison, 206 Ill., 534, 538 (1904), the second and third stories of a brick opera house were held, in a partition suit, to be real estate.]

[Where, after a sale of real estate in a partition suit, and before deliv-

*It is also well settled that the right to remove fix- [*272] tures annexed to real estate by one in possession thereof under a contract for its purchase without paying rent therefor, is to be determined by the rule prevailing between grantor and grantee, or mortgagor and mortgagee, and not that between landlord and tenant. Fixtures erected under such circumstances may, as against the vendor of the land, neither be removed by the vendee, mortgaged or sold by him, nor seized and sold on *fi. fa.* against him as his personal property.[4] And the rule is

ery of the deed, one tenant in common removed property that is a part of the real estate, it is incumbent upon the court to see that the purchaser receives all that he paid for, or withhold from the party doing the injury, a sufficient amount of the purchase money in its hands to compensate the purchaser. Oliver v. Lansing, 59 Neb., 219, 226 (1899).]

[4] See McLaughlin v. Nash, 14 Allen, 136 (1867), where it was held that a trip-hammer firmly attached to a block set in the ground, the blower of the forge, set on the floor and fastened by bolts, a force-pump fastened by screws to the side of the building and operated by the engine, and shafting fastened to the building by screws and bolts, annexed by the purchaser and specially adapted to be used in connection with the freehold, could not be severed without the consent of the holder of the legal title; but that a steam-engine and boiler, portable and in their own frames, a planing-machine and anvils resting on the floor or ground and not fastened, vices merely annexed to a work-bench by screws and bolts, a grind-stone on a movable frame and an emery-machine set on the floor and fastened with bolts, but more connected with the engine and boiler which were not fixtures than with any articles which were, and capable of removal without material injury to the realty and of being used elsewhere, had never lost their character of chattels and might be removed; Hemenway v. Cutler, 51 Me., 407 (1863); Poor v. Oakman, 104 Mass., 309 (1870); Oakman v. Dorchester Ins. Co., 98 Mass., 57 (1867); King v. Johnson, 7 Gray, 239 (1856); Milton v. Colby, 5 Met., 78 (1842); Eastman v. Foster, 8 Met., 19 (1844); Murphy v. Marland, 8 Cush., 575; Ogden v. Stock, 34 Ill., 522 (1864); Dooley v. Crist, 25 Ill., 551 (1861); Christian v. Dripps, 28 Penn. St., 271 (1857); English v. Foote, 16 Miss., 444 (1847); Perkins v. Swank, 43 Miss., 349 (1871). See, also, Smith v. Altick, 24 Ohio St., 369 (1873); Tabor v. Robinson, 36 Barb., 483 (1862). [Miller v. Waddingham, 11 L. R. A., 510 (Cal., 1891); Gunderson v. Kennedy, 104 Ill. App., 117 (1902); Central Branch R. R. Co. v. Fritz, 20 Kan., 430, 437 (1878); Hinkley Iron Co. v. Black, 70 Me., 473 (1880); Skillin v. Moore, 79 Me., 554 (1887); Tyler v. Fickett, 75 Me., 211, 213 (1883); Westgate v. Wixon, 128 Mass., 304 (1880); Smith Paper Co. v. Servin, 130 Mass., 511, 516 (1881); Michigan Mut. Ins. Co. v. Cronk, 93 Mich., 49, 51 (1892); Hannibal & St. Jo. R. R. Co. v. Crawford, 68 Mo., 80, 82 (1878); McFadden v. Allen, 134 N. Y., 489, 490 (1888), aff'g 57 Supr. Ct. (50 Hun),

361 (1888); Andrews v. Powers, 66 App. Div., 216 (N. Y., 1901); Chandler v. Hamell, 57 App. Div., 305 (N. Y., 1901); Church v. Lapham, 94 App. Div., 550 (N. Y., 1904); Moore v. Valentine, 77 N. C., 188 (1877); Clark v. McKnight, 25 Tex. Civ. App., 60, 62 (1901); Shelton v. Willis, 23 Tex. Civ. App., 547, 550 (1900); Snodgrass v. Posey, 30 Tex. Civ. App., 584 (1902); Patton v. Moore, 16 W. Va., 428, 442 (1880); Taylor v. Collins, 51 Wis., 123 (1881); Cleaver v. Culloden, 15 Up. Can. Q. B., 582, 584; Gasco v. Marshall, 7 Up. Can. Q. B., 193, 196; Doran v. Willard, 14 N. B., 358 (1873); Reynolds v. Deehman, 2 Nova S. L. R., 459 (1881); see, also, Newland v. Baker, 26 Kan., 341, 344 (1881); Cutter v. Wait, 91 N. W., 753 (Mich., 1902); Wagar v. Briscoe, 38 Mich., 587 (1878); Harris v. Hitt, 58 Mo. App., 459 (1894); McCrillis v. Cole, 55 Atl., 196 (R. I., 1903); Seatoff v. Anderson, 28 Wis., 212, 215 (1871); First Nat. Bank of Austin v. Jackson, 40 S. W., 833, 834 (Tex. Civ. App., 1897).]

[Where, under a contract of sale of a lot, the vendee erects a house, and, subsequently, upon cancellation of his notes, he agrees to surrender possession and pay rent, he can not remove the house. Crum v. Hill, 40 Iowa, 506 (1875). The decision indicates that the subsequent transaction was a sale by the builder of the house, rather than that the house was a fixture. The house was small, and rested upon posts.]

[Where a contract of sale of a mining-claim provided that upon failure of the vendee to carry out the agreement, improvements made upon the property should become the property of the vendor, the word "improvements" is very comprehensive, and does not refer to the shaft and drifts, but to all betterments which, in the absence of such agreement, would be removable. Smith v. Detroit Min. Co., 97 N. W., 17, 19 (S. D., 1903).]

[Where the parties to a contract of sale, after a dispute as to whether an engine and machinery upon the property are fixtures, mutually consent to a severance and sale thereof to preserve them from exposure, their rights are not in any way affected. Moore v. Valentine, 77 N. C., 188, 192 (1877).]

[That the grantor knew of improvements, making no objection, does not affect his rights, as he has a right to suppose that the conditions of the sale would be fulfilled, and there is no duty resting upon him to make any objection. On the other hand the purchaser must have contemplated the completion of his contract, and have intended them to be a part of the freehold. Lapham v. Norton, 71 Me., 83, 85 (1880).]

[An assertion by the land-owner that he would not release the building until damages for injury to the lot should be paid him, is not a disclaimer of ownership. Dustin v. Crosby, 75 Me., 75, 78 (1883).]

[Where a house which has been built upon a lot which the builder is under contract to purchase, is moved to another lot by an assignee of the contract, and a deed to the latter lot "together with all the houses," etc., is afterwards given by the vendor to such assignee, the right of action by the vendor for damages for the conversion of the house by the assignee is not affected. Cleaver v. Culloden, 15 Up. Can., Q. B., 582; 14 Up. Can., Q. B., 491.]

[The rule is the same as to fixtures already upon the place which are owned by the vendee at the time of making the contract. Seiberling v. Miller, 207 Ill., 443, 448 (1904), aff'g 106 Ill. App., 190, 193 (1902). But where a tenant, with the consent of the landlord, moves a frame house, valued at three hundred dollars, upon the leased lot, which he has a right to remove, and about a month later the landlord makes a contract of sale of the lot to the tenant for two hundred and fifty dollars, it can not be assumed that the sale included the house, and the right of removal is not affected. McDonald v. Shepard, 25 Kan., 112, 115 (1881).]

[A deed of an undivided one-half of a homestead was executed by the owners and their wives, to be delivered when the purchase money was paid. The grantees and the husbands then entered into a partnership, in pursuance of which certain machinery was attached to the land. Afterwards, the purchase-money not having been paid, the conveyance was voluntarily rescinded, and the partnership dissolved, the husbands giving a chattel mortgage upon the machinery for the balance due upon settlement of partnership accounts. *Held*, that, as against the wives, the machinery attached by such grantees could not be removed from the homestead. Phelan v. Boyd, 14 S. W., 290 (Tex., 1890).]

[The vendor's claim to buildings is superior to a mechanics' lien. Davis v. Elliott, 7 Ind. App., 246 (1893); Dustin v. Crosby, 75 Me., 75, 77 (1883); Galveston Exhib. Ass'n v. Perkins, 80 Tex., 62, 67 (1891).]

[Where land is conveyed which is to revert to the grantor upon certain conditions, and there is re-entry for condition broken, a church edifice, which has been erected upon the land, passes with it. Union Church v. Gaylord, 1 Ky. L. R., 403 (1880). See, also, Gulf, C. & S. R'y Co. v. Dunman, 35 S. W., 947 (Tex. Civ. App., 1896), 33 S. W., 1024 (Tex. Civ. App., 1896), as to a pump, etc.; and Carr v. Georgia R. R., 74 Ga., 73, 81 (1884), as to a brick depot. In the last case it was held that even though it might be admitted that the company had the right to remove the depot before abandoning possession, it became a trespasser by removing it afterwards; and as the grant was with a provision that, upon ceasing to use the land and building to be erected thereon as a depot, the land should revert to the grantor, on abandonment by the grantee the law cast the title upon the grantor, and, it being vacant, was in his possession, and no entry was necessary. See, as to a tollhouse, Montgomery County v. Bean, 82 S. W., 240, 241 (Ky., Sept. 28, 1904).]

[A "box house," not attached in any way except by its own weight, is removable by the vendee. Brannon v. Vaughn, 66 Ark., 87 (1898); so, as to a house resting upon posts. Central Branch R. R. Co. v. Fritz, 20 Kan., 430, 437 (1878); so, as to a large cooking range though fastened to the floor. John Van Range Co. v. Allen, 7 So., 499 (Miss., 1890). A purchaser, from the vendee, of a portable furnace and gas-fixtures, especially if the purchaser has removed them, is protected. Towne v. Fiske, 127 Mass., 125 (1879). Likewise, a saw-mill is not a part of the realty between a chattel mortgagee thereof, and the vendor of the land. Burrill v. Wilcox Lumber Co., 65 Mich., 571, 575 (1887).]

[If one annexing an engine to land, has a conditional contract of purchase thereof, as that he might abandon the contract if the land was not satisfactory for mining purposes, his right of removal would have been the same as that of a lessee, as the presumption would be that the intention was that the annexation was temporary and not permanent. Moore v. Valentine, 77 N. C., 188, 190.]

[Where land was deeded to a railway company upon conditions which were not performed, the right of the grantor, upon recovering his land, to the structures (a steam-pump, boiler, iron pipe, etc.) erected by the railway company, will depend upon whether or not there has been a permanent annexation. Gulf, &c., R'y Co. v. Dunman, 85 Tex., 176, 182 (1892).]

[Where a person, who has dealt with the vendee as owner of the land, and who has notice of a chattel mortgage on a building on such land, given by the vendee, subsequently acquires title to the land, his rights are subordinate to those of the chattel mortgagee. Holt County Bank v. Tootle, 25 Neb., 408 (1889).]

[Where a contract of sale gives the grantor the right of forfeiture in case of default in the payment of installments, and he after a default sees material for a building thereon furnished by parties who believed that another party owns the building, the grantor will be estopped to claim the building as against such material men. Bell v. Swallwell Land Co., 20 Wash., 602, 605 (1899).]

[Of course if the grantor refuses or is unable to convey, the grantee has a reasonable time in which to remove his improvements. Lapham v. Norton, 71 Me., 83, 87 (1880); Hinkley Iron Co. v. Black, 70 Me., 473, 482 (1880); Waters v. Reuber, 16 Neb., 99 (1884).]

[Where the contract of purchase was induced by false and fraudulent representations of the vendor, the vendee has the right to place himself *in statu quo* by removing a house built by him if it can be done without injury to the freehold remaining. Cutter v. Wait, 131 Mich., 508 (1902).]

[Where annexations are made by one in possession with an option to purchase, they do not become a part of the realty; nor does an election to purchase, and a forfeiture, change the character of such annexations as between one taking a chattel mortgage thereof before the exercise of such option, and a purchaser of the real estate subject to such option. Alberson v. Elk Cr. Min. Co., 39 Ore., 552, 562 (1901). See, also, as to options to purchase, Cook v. Enright, 134 Cal., 1 (1901); and Pomeroy v. Bell, 118 Cal., 635 (1897).]

The opposing case of Raymond v. White, 7 Cow., 319 (1827), seems contrary to the clear weight of authority. See, however, Ross's Appeal, 9 Penn. St., 496 (1848). [As long as the vendee remains in possession, and complies with his contract, he has a right to remove buildings erected by him, which his contract did not require him to erect, unless the vendor's security is thereby impaired. Miller v. Waddingham, 91 Cal., 377, 382 (1891); Weed v. Hall, 101 Pa. St., 592, 596 (1882). After default in payments, but before the grantor forecloses his contract, the grantee has

*the same notwithstanding the contract contains a clause [*273] that upon default of payment the vendee is to be considered a tenant at will of the vendor at a specified rent, and that payment is to be a condition precedent and time of the essence of the contract.[1] According to the better opinion, also, it seems that the rule is the same where possession is taken, and the annexations made under a parol agreement for the purchase of the land, though there is some conflict of authority upon the question.[2]

a perfect right to dispose of a house built by him under the contract. Northrup v. Trask, 39 Wis., 515 (1876). Improvements made by a homestead entryman upon lands of the United States, are no part of the realty. Crocker v. Donovan, 1 Okla., 165 (1892).]

[1] Moore v. Smith, 26 Ill., 392 (1861), reversing s. c., 24 Ill., 512.

[2] See Hutchins v. Shaw, 6 Cush., 58 (1850), where it was *held*, that a house built by one person upon the land and partly with the materials of another, under a verbal agreement that upon payment of a specified sum by the builder for the land and materials the owner should give him a deed of the land, is not the personal estate of the builder, but the real estate of the owner of the land. [See Kenerson v. Colgan, 164 Mass., 166 (1895).]

[Street railway track laid under a license given upon assurance that the company would buy the land, becomes the property of the landowner when the land is not purchased, and the operation of the road is abandoned. Tudor Iron Works v. Hitt, 49 Mo. App., 472 (1892).]

See, also, Christian v. Dripps, 28 Penn. St., 271 (1857). In this case two persons were engaged as partners in a manufactory, and upon a third person's being taken in as a partner, the real and personal estate was charged upon the books of the firm as partnership property of the new firm. The real estate consisted of a foundry and machine-shop theretofore sold by articles of agreement running from the plaintiff to the two partners first mentioned, the legal title remaining in the plaintiff. The incoming partner put in certain machinery with which he was credited. *Held*, that, all being in possession as owners and none as tenants, and the machinery being the property of the firm, it became a fixture independent of the actual ownership of the real estate, and notwithstanding the title of the third partner to the real estate might be defective for want of compliance with the Statute of Frauds, the annexation being otherwise sufficient.

[It makes no difference that erections were by a firm, while the interest in the land was owned by some members of the firm, where the interest was held for the benefit of the firm. Hinkley Iron Co. v. Black, 70 Me., 473, 483 (1880).]

The true reason of the rule, where the contract is in writing, seems to be that the annexations are made with the design of being permanent. See Moore v. Smith, 26 Ill., 392 (1861). And this reason is equally applicable

[*274] *Between grantor and grantee, and mortgagor and mortgagee, however, the effort of a court is always to ascertain the intent of the parties, and to give it effect. If their language affords evidence that a chattel is intended to pass, it will of course pass, whether it be a mere chattel or one which by annexation has become part of the realty. But where no specific intention is collectible, or where the conveyance is of land by metes and bounds, and on the land a building stands in which

to the case of a parol agreement for the purchase of land, in the absence of any agreement as to the ownership of the thing annexed.

The equitable doctrine of part performance taking the case out of the Statute of Frauds, in states where it has been adopted, may possibly have some influence upon the determination of the question, though it does not as yet seem to have been considered by the courts. See Adam's Eq., *86 *et seq.*

The cases opposing the rule stated in the text seem to make the fact that the erections were by the *permission* of the owner of the soil, their principal if not sole ground, and do not discuss the question of the effect of an intention to make the annexation a permanent accession to the freehold. See as opposed to the doctrine of the text, Pullen v. Bell, 40 Me., 314 (1855); Russell v. Richards, 10 Me., 429 (1833); s. c., 11 Me., 371.

[See Dustin v. Crosby, 75 Me., 75, 78 (1883), which holds that Pullen v. Bell, 40 Me., 314, is erroneous. See, also, Kingsley v. McFarland, 82 Me., 231 (1889); Lapham v. Norton, 71 Me., 83, 85 (1880); Bracelin v. McLaren, 59 Mich., 327, 328 (1886); Long v. Finger, 74 N. C., 502 (1876).]

It should be remarked that the doctrine of part performance has not been adopted in Massachusetts and Maine. Stearns v. Hubbard, 8 Me., 320 (1832); Wilton v. Harwood, 23 Me., 131 (1843); Patterson v. Yeaton, 47 Me., 308 (1859); Parker v. Parker, 1 Gray, 409 (1854); Brooks v. Wheelock, 11 Pick., 439 (1831).

[Possession was taken with the understanding that a written agreement was to be signed. After mining machinery was attached to the premises, the land-owners refused to sign. *Held*, that the machinery could be removed. Goodwin v. Perkins, 134 Cal., 564 (1901).]

[Where the grantor refuses to carry out a parol agreement to convey, the grantee is entitled to the value of his improvements. Treece v. Treece, 73 Tenn., 221, 223 (1880); but the grantee can not bring an action of assumpsit for his improvements as long as he is in possession. Naftzinger v. Roth, 93 Pa. St., 443, 448 (1880). Where one makes improvements under a parol contract for the purchase of land, which the owner refuses to perform and denies, and directs the removal of the improvements, such party can obtain no compensation for his improvements. McCracken v. McCracken, 88 N. C., 272, 275 (1883).]

is the thing in controversy, then it will pass or not according as the thing is or is not in law, part of the realty.[1]

The questions to be determined then in every instance are, first, whether the solution of the question is affected by any specific intention appearing in the instrument; and if so, what is its effect; and second, if no such specific intention appears, whether the article in controversy is or not in law part of the realty.

I. The Question as Uninfluenced by any Specific Intention.

The general rule as to what passes with the land being the same in the relations of grantor and grantee, and mortgagor and mortgagee, and in cases of partition between tenants in common, they will so far as convenient be considered together, leaving the effect of a specific intention and certain other subjects properly belonging in this chapter, to be hereinafter considered in separate sections.

*The general rule undoubtedly is, that all fixtures, [*275] whether actually or constructively[2] annexed to the realty, pass by a conveyance or mortgage of the freehold,[3] where there is noth-

[1] Per Johnson, C. J., in Murdock v. Gifford, 18 N. Y., 28, 31 (1858). [See *ante*, p. *42.]

[2] See *post* in this chapter; also, *ante*, chap. 1, p. *33.

[3] *E. g.* Steam-engines, boilers, fire-grates, etc., bolted and secured on permanent foundations, or laid up in brick, etc. Roberts v. Dauphin, etc., Bank, 19 Penn. St., 71 (1852); Teaff v. Hewitt, 1 Ohio St., 511 (1853); Winslow v. Merchants' Ins. Co., 4 Met., 306 (1842); Oves v. Ogelsby, 7 Watts, 106 (1838); Sands v. Pfeiffer, 10 Cal., 258 (1858); McKim v. Kennedy, 3 Md. Ch. Dec., 186 (1852); *Ex parte* Price, 2 Mont. Dea. & DeG., 518 (1842); s. c., 11 L. J. (N. S.), Bank., 27; 6 Jur., 327; Crane v. Brigham, 11 N. J. Eq., 29 (1855); Sweetzer v. Jones, 35 Vt., 317 (1862); Harris v. Haines, 34 Vt., 220 (1861); Climie v. Wood, L. R., 3 Exch., 257; s. c., L. R., 4 Exch., 328 (1869); Longbottom v. Berry, L. R., 5 Q. B., 123 (1869); s. c., 39 L. J. (N. S.), Q. B., 37, 45; *Ex parte* Montgomery, 4 Ir. Ch., 520 (1855); Green v. Phillips, 26 Gratt., 752 (1875); Bennett v. Allen, Sup'r Ct. of Buffalo (1857), 2 Clint. N. Y. Dig., p. 1416, pl. 48, 49; Powell v. Striker, 12 Law Reporter, 366 (1849); Allison v. McCune, 15 Ohio St., 726 (1846); Sparks v. The State Bank, 7 Blackf., 469 (1845); Brennan v. Whitaker, 15 Ohio St., 446 (1864); Quinby v. Manhattan Cloth, etc., Co., 24 N. J. Eq., 260 (1873). [Fisk v. People's Bank, 14 Colo. App., 21 (1889); Tolles v. Winton, 63 Conn., 440 (1893); Seiberling v. Miller, 106 Ill. App., 190, 193 (1902), aff'd 207 Ill., 443 (1904); Kloess

v. Katt, 40 Ill. App., 99, 100 (1891); Jenney v. Jackson, 6 Ill. App., 32 (1880); Otis v. May, 30 Ill. App., 581, 585 (1888); Ottumwa Mill Co. v. Hawley, 44 Iowa, 57 (1876); *Re* Worland, 92 Fed., 893, 895 (U. S. Dist. Ct., Iowa, 1899); Reyman v. Henderson Nat. Bank, 17 Ky. L. R., 1291, 1293 (1896); New Orleans Banking Co. v. Leeds, 49 La. Ann., 123 (1897); Dudley v. Hurst, 67 Md., 44 (1887); Southbridge Sav. Bank v. Exeter Mach. Works, 127 Mass., 542, 545 (1879); McConnell v. Blood, 123 Mass., 47 (1877); Coleman v. Stearns Mfg. Co., 38 Mich., 30 (1878); Thomas v. Davis, 76 Mo., 72 (1882); Davis v. Mugan, 56 Mo. App., 311 (1893); Dutro v. Kennedy, 9 Mont., 101 (1889); Cavis v. Beckford, 62 N. H., 229 (1882); Langdon v. Buchanan, 62 N. H., 657, 659 (1883); Tibbetts v. Horne, 65 N. H., 242 (1889); Atlantic Trust Co. v. Atlantic City Laundry Co., 64 N. J. Eq., 140, 146 (1902); Roddy v. Brick, 42 N. J. Eq., 218 (1886); Keeler v. Keeler, 31 N. J. Eq., 181, 190 (1879); Watson v. Watson Mfg. Co., 30 N. J. Eq., 483 (1879); Fish v. N. Y. Paper Co., 29 N. J. Eq., 16 (1878); Doughty v. Owen, 19 Atl., 540 (N. J. Ch., 1890); Lee v. Hubschmidt Bldg. Co., 55 N. J. Eq., 623, 624 (1897); Speiden v. Parker, 46 N. J. Eq., 292 (1889); Scheifele v. Schmitz, 42 N. J. Eq., 700, 701 (1887); Jackson *ads.* Turrell, 39 N. J. Law, 329, 330 (1877); Berliner v. Piqua Club, 66 N. Y. Supp., 791 (1900); Phoenix Mills v. Miller, 17 N. Y. Supp., 158 (1891); Best v. Hardy, 123 N. C., 226, 228 (1898); Horne v. Smith, 105 N. C., 322 (1890); Case Mfg. Co. v. Garver, 45 Ohio St., 289 (1887); Albert v. Uhrich, 180 Pa. St., 283 (1897); Jones v. Bull, 85 Tex., 136, 139 (1892); Ice Co. v. Lone Star Works, 15 Tex. Civ. App., 694 (1897); Homestead Land Co. v. Becker, 96 Wis., 206, 211 (1897); Carr v. Fire Assurance Ass'n, 14 Ont., 487 (1887); Minhinnick v. Jolly, 29 Ont., 238, 246 (1898), aff'd 26 Ont. App., 42 (1899); London Loan Co. v. Pulford, 8 Ont. Pr., 150 (1879); Stevens v. Barfoot, 13 Up. Can. App., 366 (1886); Oates v. Cameron, 7 Up. Can. Q. B., 228; Dickson v. Hunter, 29 Gr. Ch., 73, 86 (Ont., 1881); Philion v. Bisson, 23 Low. Can. Jur., 32 (Super., 1878); Adamson v. McIlvaine, 3 Man., 29 (1885); Cross v. Barnes (1877), 46 L. J. Q. B., 479; Security Tr. Co. v. Temple Co., 58 Atl., 865 (N. J. Ch., 1904).]

So, as to a steam-engine, weighing five tons, which could not be removed without taking down part of the building, but not attached to any fastening. Despatch Line v. Bellamy Manf'g Co., 12 N. H., 205 (1841). See, however, Park v. Baker, 7 Allen, 78 (1863), where an ice-chest, too large to be removed from a room without being taken to pieces, but in no way affixed to the building, was *held* not to pass; also 99 Mass., 458.

See, also, as to steam-engines passing with the land, Gary v. Burguieres, 12 La. Ann., 227 (1857); Code of La. Arts. 455, 460. [See, *post*, p. *290. DeLacy v. Tillman, 83 Ala., 155 (1887).] See, however, Randolph v. Gwynne, 7 N. J. Eq., 88 (1848), cited *post;* Wade v. Johnston, 25 Geo., 331 (1858). [In Hart v. Sheldon, 41 Supr. Ct. (34 Hun), 38 (N. Y., 1884), a steam-engine of six-horse power, standing on wheels, not annexed to the soil, placed within a factory to run the machinery therein, the smoke-stack passing through the roof, was held to pass with the realty, although removable without injury.]

[So, as to a gas engine bolted to a concrete foundation. Hobson v. Gorringe [1897], 1 Ch., 182, 192.]

So, as to lathes, etc., fixed in a permanent manner. Mather v. Fraser, 2 Kay & John., 536 (1856); s. c., 2 Jur. (N. S.), 900. [New Orleans Banking Co. v. Leeds, 49 La. Ann., 123 (1897).]

So, as to steam pumps on permanent foundations. Quinby v. Manhattan Cloth, etc., Co. (*supra*). [Dudley v. Hurst, 67 Md., 44 (1887); McConnell v. Blood, 123 Mass., 47 (1877); Speiden v. Parker, 46 N. J. Eq., 292 (1889); Sun Assurance Co. v. Taylor, 9 Man., 89, 101 (1893).]

So, as to a bathing-tub and lead pipes fastened to the floor and walls of a dwelling with nails. Cohen v. Kyler, 27 Mo., 122 (1858).

So, of furnaces intimately connected with the house. Main v. Schwarzwaelder, 4 E. D. Smith, 273 (1855); Mather v. Fraser, 2 Kay. & J., 536 (1856); s. c., 2 Jur. (N. S.), 900. [Kennard v. Brough, 64 Ind., 23 (1878); Ridgeway Stove Co. v. Way, 141 Mass., 557 (1886); Allen v. Mooney, 130 Mass., 155 (1881); Pratt v. Baker, 99 Supr. Ct. (92 Hun), 331 (N. Y., 1895); Scottish Am. Co. v. Sexton, 26 Ont., 77, 79 (1894).]

[So, as to a range with boiler attached resting upon a brick foundation in a hotel; tanks and filters connected by pipes with the city water-mains; mosquito transoms and window screens fitted to particular windows, and moving in grooves. Fratt v. Whittier, 58 Cal., 126, 132 (1881). As to stoves, see, *post*, p. *300.]

So, of stills and kettles set in brick-work. Union Bank v. Emerson, 15 Mass., 159 (1818); Despatch Line v. Bellamy Manuf'g Co., 12 N. H., 205 (1841); Noble v. Bosworth, 19 Pick., 314 (1837); Bryan v. Lawrence, 5 Jones' Law, 337 (1858). [So, as to a mash-tub connected with a large shaft in the center of it. Scheifele v. Schmitz, 42 N. J. Eq., 700, 701 (1887); also a mash-tub not actually affixed, but adapted to brewery, and not removable without taking down part of the building. Manufacturers' Nat. Bank v. Rober, 19 N. Y. Wkly. Dig., 476, 477 (1884). So, as to kettles and gasoline pots upon foundations in a canning factory. Dudley v. Hurst, 67 Md., 44 (1887).]

Contra, Hunt v. Mullanphy, 1 Mo. (1st ed.), 508 (1825), where the kettle or boiler was built into a furnace with brick and mortar so as to hide it except the mouth.

So, of potash-kettles used in the business of an ashery, and set in an arch with a chimney, the arch set upon a platform, but not fastened to the building. Miller v. Plumb., 6 Cow., 665 (1827). [So, of tar tank and kettles fixed. Knickerbocker Tr. Co. v. Penn Cordage Co., 62 N. J. Eq., 624 (1901). See Lavenson v. Standard Soap Co., 80 Cal., 245 (1889), as to soap kettles.]

So, of shafting, suspended by iron hangers or other permanent manner, gearing, etc. Longbottom v. Berry (*supra*); Ackroyd v. Mitchell, 3 L. T. (N. S.), 236 (1860); Corliss v. McLagin, 29 Me., 115 (1848); Bowen v. Wood, 35 Ind., 268 (1871); Harris v. Haines, 34 Vt., 220 (1861); Hill v. Wentworth, 28 Vt., 428 (1856); Allison v. McCune (*supra*); Harkness v. Sears, 26 Ala., 493 (1855); Quinby v. Manhattan Cloth, etc., Co. (*supra*);

Mather v. Fraser (*supra*); *Ex parte* Wilson, 2 Mont. and Ayr., 61 (1835); s. c., 4 Dea. & Chit., 143; *Ex parte* Montgomery, 4 Ir. Ch., 520 (1855). See, however, Wade v. Johnson, 25 Geo., 331 (1858); Farrar v. Chauffetete, 5 Den., 527 (1848). [Seiberling v. Miller, 106 Ill. App., 190, 193 (1902), aff'd 207 Ill., 443 (1904); McConnell v. Blood, 123 Mass., 47 (1877); Langdon v. Buchanan, 62 N. H., 657, 659 (1883); Atlantic Tr. Co. v. Atlantic Cy. Laundry Co., 64 N. J. Eq., 140, 146 (1902); Lee v. Hubschmidt Bldg. Co., 55 N. J. Eq., 623, 624 (1897); Roddy v. Brick, 42 N. J. Eq., 218 (1886); Delaware, L. & W. R. R. Co. v. Oxford Iron Co., 36 N. J. Eq., 452 (1883); Keeler v. Keeler, 31 N. J. Eq., 181, 190 (1879); Watson v. Watson Mfg. Co., 30 N. J. Eq., 483 (1879); Doughty v. Owen, 19 Atl., 540 (N. J. Ch., 1890); Phoenix Mills v. Miller, 17 N. Y. Supp., 158 (1891); Best v. Hardy, 123 N. C., 226, 228 (1898); Homestead Land Co. v. Becker, 96 Wis., 206, 211 (1897); Carr v. Fire Assurance Ass'n, 14 Ont., 487; Gooderham v. Denholm, 18 Up. Can. Q. B., 203 (1859); Philion v. Bisson, 23 Low. Can. Jur., 32 (Super., 1878).]

So, of gas-fittings. Ackroyd v. Mitchell (*supra*); *Ex parte* Acton, 4 L. T. (N. S.), 261 (1861); *Ex parte* Wilson, 2 Mont. & Ayr., 61 (1835). [Atkinson v. Noad, 14 Low. Can., 159 (1863).] Though not of gas-fixtures. See *post* in this chapter. [So, of gas and electric chandeliers. Staek v. Eaton, 4 Ont. Law, 335 (1902).]

So, of iron pipes for heating purposes, attached in the usual way by slings, hangers, etc. Quinby v. Manhattan Cloth Co.; *Ex parte* Wilson (*supra*). [Keeler v. Keeler, 31 N. J. Eq., 181, 190 (1879); National Bank v. North, 160 Pa. St., 303 (1894). So, of heating plant. Williams v. Chicago Exhib. Co., 188 Ill., 19 (1900); Tyler v. White, 68 Mo. App., 607, 609 (1897). So, of radiators. Watson v. Watson Mfg. Co., 30 N. J. Eq., 483 (1879); Capehart v. Foster, 61 Minn., 132, 134 (1895); Murphy v. Smith, 61 App. Div., 574, 575 (N. Y., 1901).]

So, of a railway fixed to the ground by means of sleepers partially buried in the ground, the rails let into and attached to the sleepers by spikes. The Patent Peat Co., 17 L. T. (N. S.), 69 (1867). [VanHusen v. Omaha B. & T. R'y Co., 118 Iowa, 366, 378 (1902); Speiden v. Parker, 46 N. J. Eq., 292 (1889); Roddy v. Brick, 42 N. J. Eq., 218 (1886); VanKeuren v. Central R. R. of N. J., 38 N. J. Law, 165, 167 (1875). So, of a tramway and a steam crane on a stone quarry. *Ex parte* Moore & Robinson's Banking Co. (1880), 14 Ch. D., 379, 386.]

So, of water-wheels and gears. Corliss v. McLagin; Bowen v. Wood (*supra*); McCluney v. Lemon, Hayes, 154 (1831); Davenport v. Shants, 43 Vt., 546 (1871). [United States v. Friction-Match Mach., 1 Haskell, 32, 36 (U. S. Dist. Ct., Me., 1866); Thompson v. Vinton, 121 Mass., 139, 142 (1876); Robertson v. Corsett, 39 Mich., 777, 782 (1878); Keeler v. Keeler, 31 N. J. Eq., 181, 190 (1879); Phoenix Mills v. Miller, 17 N. Y. Supp., 158 (1891), aff'g 4 N. Y. St. R., 787, 790 (1886).]

So, of hydraulic and other presses, steam and water-pipes, etc., fixed to the freehold. Crane v. Brigham, 11 N. J. Eq., 29 (1855); Longbottom v. Berry, L. R. 5 Q. B., 123 (1869); s. c., 39 L. J. (N. S.), Q. B., 37, 44;

Despatch Line v. Bellamy Manuf'g Co.; Quinby v. Manhattan Cloth, etc., Co. (*supra*); Bond v. Coke, 71 N. C., 97 (1874), a cotton-press; Baker v. Davis, 19 N. H., 325 (1849), a clothier's press. [Jones v. Bull, 85 Tex., 136, 139 (1892), a cotton-press. Otis v. May, 30 Ill. App., 581, 585 (1888), a printing press.]

So, of an iron safe let into a brick wall, and surrounded with brick and mortar. Longbottom v. Berry (*supra*).

So, of leather belting not removable entirely without being separated at the point where the ends are united, though capable of being slipped off from the drum of the shaft. Longbottom v. Berry (*supra*). [See Seiberling v. Miller, 106 Ill. App., 190, 193 (1902), aff'd 207 Ill., 443 (1904); Langdon v. Buchanan, 62 N. H., 657, 659 (1883); Delaware, L. & W. R. R. Co. v. Oxford Iron Co., 36 N. J. Eq., 452 (1883); Keeler v. Keeler, 31 N. J. Eq., 181, 190 (1879); Gill v. Weston, 110 Pa. St., 312, 317 (1885); Philion v. Bisson, 23 Low. Can. Jur., 32 (Super., 1878); Sheffield Bldg. Soc. v. Harrison (1884), 15 Q. B. D., 358. See, also, Knickerbocker Tr. Co. v. Penn Cordage Co., 62 N. J. Eq., 624 (1901), belting "from six inches up, which drives from the shafts."]

So, of a "Noyes portable grist-mill," the frame containing which was fastened to the building by being placed on timbers resting on the floor and secured by bolts passing through the frame and these timbers and the floor joists and corresponding timbers below supported by upright posts resting on the cellar bottom, the bolts being secured by screws, nuts and washers, and such mill being designed as a permanent structure for use as a custom grist-mill. Potter v. Cromwell, 40 N. Y., 287 (1869). See, also, Place v. Fagg, 4 M. & R., 277 (1829); s. c., 7 L. J., K. B., 195; Gardner v. Finley, 19 Barb., 317 (1855); a patent mill and buzz-saws put into another mill. [A portable grist-mill and scales. Langdon v. Buchanan, 62 N. H., 657, 659 (1883).]

So, of a windlass in a slaughter-house, the ends of which passed through holes in upright pieces of timber firmly nailed at top and bottom. Capen v. Peckham, 35 Conn., 88 (1868).

So, of a threshing-machine fixed by bolts and screws to posts let into the ground. Wiltshear v. Cottrell, 1 Ell. & Bl., 674 (1853); s. c., 22 L. J., Q. B., 177; 17 Jur., 758; 18 Eng. L. & Eq., 142.

So, of a cider-mill and press, the press standing upon cross-sills lying upon bed-sills resting on flat stones in the ground, the press-sills halved and fastened into the bed-sills by keys, and the post of the screw-beam braced to the frame of the building with the brace secured by nails, and which could not be removed from the building without being taken apart. As to the detached portions of the mill see *post* in this chapter. Wadleigh v. Janvrin, 41 N. H., 503 (1860), disapproving the cider-mill case decided by Comyns, C. B., cited 3 Atk., 14.

[So, of a sorghum-mill fastened to a log set in the ground. Kennard v. Brough, 64 Ind., 23 (1878). See Hutchins v. Masterson, 46 Tex., 551, 555 (1877), as to a sugar-mill.]

So, of a cotton gin fastened to the house by nails and braces. Degraf-

fenreid v. Scruggs, 4 Humph., 451 (1844). See, also, Laflin v. Griffiths, 35 Barb., 58 (1860), and *post* in this chapter. [Best v. Hardy, 123 N. C., 226, 228 (1898); Jones v. Bull, 85 Tex., 136, 139 (1892). See, also, Smith v. Odom, 63 Ga., 499, 503 (1879), as to the running gear of a cotton-gin.]

So, of a drying kiln and piping. Burke v. Taylor, 46 Up. Can. Q. B., 371 (1881).]

So, of a steam-engine, hay-cutter, corn-crusher, malt-mill and mill-stones erected by an inn-keeper for use in his business. Walmsley v. Milne, 7 C. B. (N. S.), 115 (1859). [See, as to mill-stones, Best v. Hardy, 123 N. C., 226, 228 (1898).]

So, of the machinery of a sash, door, blind, etc., factory, consisting of planing-machines, shapers, and moulding-machines firmly fastened to and necessary to the purposes of the factory. Green v. Phillips, 26 Gratt., 752 (1875). [So, of the heavy machinery in a planing-mill, kept steady by cleats nailed down. Adamson v. McIlvaine, 3 Man., 29 (1885). See, also, Tibbetts v. Hornes, 65 N. H., 242 (1889), as to bobbin-mill machines.]

So, of the machinery of a paper-mill. Bowen v. Wood, 35 Ind., 268 (1871).

[So, of calenders, metal rolls, paper trimming and cutting machines, embossing and enameling machines, force-pump, and steam-pipes. Fish v. N. Y. Paper Co., 29 N. J. Eq., 16 (1878).]

[So, of looms fixed to the freehold. Huddersfield Banking Co. v. Lister [1895], 2 Ch., 273.]

[So, of machinery affixed to a cloth-mill. Irish Bldg. Soc. v. Mahony (1876), 10 Irish R. Law, 363, 369.]

[So, of machinery in a flouring-mill. Case Mfg. Co. v. Garven, 45 Ohio St., 289 (1887).]

[So, of a digester, soap kettles, boiler, and candle machines, all annexed, adapted to and intended for permanent use in a soap factory. Lavenson v. Standard Soap Co., 80 Cal., 245 (1889).]

[So, of nail machines, grindstones, bluing machine, shears, scouring machines, nail bins, and duplicate machinery kept on hand in case of accident, shafting, belting, and grip levers, all in a building erected expressly to accommodate them, and never used for any other purpose. Delaware, L. & W. R. R. Co. v. Oxford Iron Co., 36 N. J. Eq., 452 (1883).]

So, of saw-mill machinery, consisting of saw-arbor and boxes, circular-saw, feed, and gig-works, log-rolls and fixtures, all attached to a frame bolted to the floor timbers. Davenport v. Shants, 43 Vt., 546 (1871). [Markle v. Stackhouse, 65 Ark., 23 (1898); Bemis v. First Nat. Bank, 63 Ark., 625 (1897); Coleman v. Stearns Mfg. Co., 38 Mich., 30 (1878); Sowles v. Raymer, 110 Mich., 189 (1896); Bigler v. National Bank of Newburgh, 33 Supr. Ct. (26 Hun), 520, 523 (N. Y., 1882); Best v. Hardy, 123 N. C., 226, 228 (1898); Horne v. Smith, 105 N. C., 322 (1890); Muir v. Jones, 23 Ore., 332, 337 (1892); Carr v. Fire Assurance Ass'n, 14 Ont.,

487 (1887); Hurrey v. Bank, 1 N. Z. L. R., Ct. App., 115, 139 (1882). See Stinchfield v. Milliken, 71 Me., 567 (1880).]

[So, of laundry machinery. Atlantic Tr. Co. v. Atlantic City Laundry Co., 64 N. J. Eq., 140, 146 (1902).]

[So, of steam-cranes, a McKenzie blower (a large iron box with a fan to create blast to melt iron), scales, a forge with the bellows used therewith, a pump, and anvils in an iron foundry. Roddy v. Brick, 42 N. J. Eq., 218 (1886); see Gooderham v. Denholm, 18 Up. Can. Q. B., 203 (1859).]

[So, of railroad spike machines weighing five thousand pounds, in a rolling-mill. McFadden v. Crawford, 36 W. Va., 671 (1892).]

[So, of machinery for smelting. Thomas v. Davis, 76 Mo., 72 (1882).]

[So, of a generator for manufacturing gas, a gas-pump, pipes, and gas-burners. Keeler v. Keeler, 31 N. J. Eq., 181, 190 (1879).]

[So, of pumps, pipes, a copper kettle, cooler, malt-mill, wind-mill, plunger and an iron elevator in a brewery. Scheifele v. Schmitz, 42 N. J. Eq., 700, 701 (1887).]

[So, of machinery for a boiler factory. Buck's App., 2 Pennypacker, 327 (Pa., 1882).]

[So, of machinery in iron works. Feder v. VanWinkle, 53 N. J. Eq., 370, 375 (1895); Kisterbock v. Lanning, 7 Atl., 596, 597 (Pa., 1887).]

[So, as to brewery machinery. Scheifele v. Schmitz, 42 N. J. Eq., 700, 701 (1887); Manufacturers' Nat. Bank v. Rober, 19 N. Y. Weekly Dig., 476, 477 (1884). So, of a refrigerating machine and apparatus in a brewery. Schmaltz v. York Mfg. Co., 204 Pa. St., 1, 18 (1902).]

[So, of mining machinery. Shields v. Delo, 145 Pa. St., 393 (1891). So, of quarry machinery. Williams' App., 1 Monaghan, 274, 282 (Pa., 1889). So, of a stone crusher. Davis v. Mugan, 56 Mo. App., 311 (1893).]

[See, generally, as to machinery, *post*, p. *291; also Fisk v. People's Bank, 14 Colo. App., 21 (1899); Fifield v. Farmers' Nat. Bank, 148 Ill., 163 (1893); Calumet Iron Co. v. Lathrop, 36 Ill. App., 249 (1889); *Re* Worland, 92 Fed., 893, 895 (U. S. Dist. Ct., Iowa, 1899); Feder v. VanWinkle, 53 N. J. Eq., 370, 376 (1895); Knickerbocker Trust Co. v. Penn Cordage Co., 58 Atl., 409, 410 (N. J., 1904); Homestead Land Co. v. Becker, 96 Wis., 206, 211 (1897); Robinson v. Cook, 6 Ont., 590, 598 (1884); London Loan Co. v. Pulford, 8 Ont. Pr., 150 (1879).]

So, of dwellings, mills or other buildings. Cole v. Stewart, 11 Cush., 181 (1853); Butler v. Page, 7 Met., 40 (1843); Pea v. Pea, 35 Ind., 387 (1871); Ritchmyer (or Richtmyer) v. Morss, 3 Keyes, 349 (1867); s. c., 4 Abb. Ct. App. Dec., 55. [See, *ante*, p. *274. Isham v. Morgan, 9 Conn., 374, 377 (1832); Williams v. Chicago Exhib. Co., 188 Ill., 19 (1900); Matzon v. Griffin, 78 Ill., 477, 481 (1875); Smyth v. Stoddard, 203 Ill., 424 (1903); Off v. Finkelstein, 200 Ill., 40 (1902), aff'g 100 Ill. App., 14, 16 (1901); Humphreys v. Newman, 51 Me., 40, 51 (1863); Oliver v. Brown, 80 Me., 542 (1888); Wight v. Gray, 73 Me., 297, 299 (1882); Mitchell v. Smith, 67 Me., 338, 343 (1876); Guernsey v. Wilson, 134 Mass.,

482, 484 (1883); Miles v. McNaughton, 111 Mich., 350, 354 (1896); Stevens v. Rose, 69 Mich., 259 (1888); Moore v. Moran, 64 Neb., 84 (1902); Bean v. Brackett, 34 N. H., 102, 119 (1856); Sweet v. Henry, 66 App. Div., 383 (N. Y., 1901); Brown v. Fox, 33 N. Y. Supp., 57 (1895); Rotan Grocery Co. v. Dowlin, 77 S. W., 430, 431 (Tex. Civ. App., 1903); Miles v. Ankatell, 25 Ont. App., 458 (1898), reversing 29 Ont., 21 (1897); Bald v. Hagar, 9 Up. Can. C. P., 382; Cameron v. Hunter, 34 Up. Can. Q. B., 121; Hudson's Bay Co. v. Macdonald, 4 Man., 237, 240 (1887); Doran v. Willard, 14 N. Brunsw., 358 (1873); see, also, Tharp v. Allen, 46 Mich., 389, 392; Gilliam v. Bird, 30 N. C., 280, 284 (1848). Where a one-story brick building covered a tract of land, part of which is granted to one person, and the remainder to another, each grantee owns in severalty that portion of the building resting upon his land, and acquires no interest in that portion resting upon the land of the other; and a bill for partition will not lie. Stevenson v. Bachrach, 170 Ill., 253, 256 (1897). An oral agreement was made for the sale of a tract of land for thirty dollars; two days later the vendor orally agreed to build a house on the land, for which the vendee was to pay three hundred dollars. After the house was built, and the vendee took possession, the vendor tendered a deed in which the consideration named was three hundred and thirty dollars, and which the vendee refused to accept, claiming that the consideration was only thirty dollars. *Held*, that the house became a part of the land, and the consideration was properly placed at three hundred and thirty dollars. Davison v. Poole, 65 Tex., 376 (1886).]

So, of doors, locks, etc. Pettengill v. Evans, 5 N. H., 54 (1829). [See, *post*, p. *301. Lackas v. Bahl, 43 Wis., 53 (1877).]

So, of a factory bell placed in a tower erected for the purpose, and firmly attached thereto. Alvord Carriage Manuf'g Co. v. Gleason, 36 Conn., 86 (1869). See, also, Weston v. Weston, 102 Mass., 514 (1869); though not as to a plantation bell temporarily placed upon two posts for use, but in no wise fastened thereto. Cole v. Roach, 37 Tex., 413 (1872).

So, of a hotel sign intended for a permanent sign for the house, fastened to the arm of a post set in the street several feet from the front line of the hotel lot and 3 or 4 feet in the ground, and secured by a band of iron spiked to the sidewalk. Redlon v. Barker, 4 Kan., 445 (1868). [See New York Life Ins. Co. v. Allison, 107 Fed., 179, 184 (U. S. C. C. A., N. Y., 1901), as to an electric sign.]

So, as to awning frames and the awning as accessory thereto, and a marble meat slab fitted to a counter. *Re* Hitchings, 4 Nat. Bank. Reg. (2d ed.), 384 (1870).

So, of shelves, drawers, and counters put up in the usual way by the owner of a building to fit it for use as a retail dry goods and grocery store, the shelves shoved into standards fastened to the wall and the counters nailed to the floor. Tabor v. Robinson, 36 Barb., 483 (1862). [That shelving, counters, saloon fixtures, and drawers pass with the realty, see Johnston v. Philadelphia Mort. Co., 129 Ala., 515, 522 (1900); Towson v. Smith, 13 App., D. C., 48 (1898); Woodham v. First Nat. Bank, 48

Minn., 67, 68 (1892); Grand Island Bank v. Koehler, 57 Neb., 649, 655 (1899); McLean v. Palmer, 2 Luz. Leg. Reg. R., 349 (1882); Connor v. Squires, 50 Vt., 680 (1878); Stack v. Eaton, 4 Ont. Law, 335 (1902); McCausland v. McCallum, 3 Ont., 305 (1883); see, however, Johnson v. Mosher, 82 Iowa, 29 (1891). See, also, Taylor v. Plunkett, 56 Atl., 384 (Del., 1903), as to bakers' tables, trays, etc., fastened by nails.]

So, as to a water pipe through which water is supplied to a house from a branch pipe of an aqueduct company with which it is connected, though such water pipe is laid across the intervening land of a third person to the point of connection in the highway. The right (possessed by the grantor) of drawing water through it, being a mere personal right, does not, however, pass by a conveyance of the premises. Philbrick v. Ewing, 97 Mass., 133 (1867). [A corporation owning a new subdivision, laid water-pipes in a public road, and connected same with the city waterworks, placing a meter at the point of connection. Subsequently it conveyed a house and lot "together with all rights, privileges, immunities and appurtenances." The premises were afterwards connected with the water-system. After selling all of its lots, the corporation, by a bill of sale, sold the water pipe and meter and all appurtenances to one of its stockholders. *Held*, that the water pipes and meter were personalty; and all that passed to the grantee of the lot as appurtenant, was the service pipe connecting with the supply pipe, and the right to receive water at a reasonable price, but no right to the main pipe, which was transferred by the bill of sale. Mulrooney v. Obear, 171 Mo., 613 (1902). See, also, Atkinson v. Noad, 14 Low. Can., 159 (1863).]

[So, of iron cupolas lined with brick, and cranes, all upon foundations, and a platform-scale in a pit of brick work. Watson v. Watson Mfg. Co., 30 N. J. Eq., 483 (1879); Lord v. Detroit Sav. Bank, 93 N. W., 1063, 1064 (Mich., 1900).]

[So, of a drill attached by screws and braces. Southbridge Sav. Bank v. Stevens Tool Co., 130 Mass., 547 (1881).]

[So, of tanks and a meat-chopper, in a slaughter-house. Kloess v. Katt, 40 Ill. App., 99, 100 (1891).]

[So, of boilers, heaters, radiators, ranges, dumb-waiters and tube attached. Murphy v. Smith, 61 App. Div., 574, 575 (N. Y., 1901).]

[So, of a brass faucet attached to a hot water boiler. Kirchman v. Lapp, 19 N. Y. Supp., 831, 832 (1892).]

[So, of a drum, hoisting works and connecting pipes in a mine. Dutro v. Kennedy, 9 Mont., 101 (1889).]

[So, of hoisting gear and derricks on or near a stone quarry and dock. Speiden v. Parker, 46 N. J. Eq., 292 (1889).]

[So, of stage fixtures, drop curtain and opera chairs. Murray v. Bender, 125 Fed., 705 (U. S. C. C. A., Mont., 1903); Bender v. King, 111 Fed., 60 (U. S. C. C., Mont., 1901); Oliver v. Lansing, 59 Neb., 219, 228 (1899); Temple Co. v. Penn Mut. Ins. Co., 69 N. J. Law, 36 (1903); New York Life Ins. Co. v. Allison, 107 Fed., 179 (U. S. C. C. A., N. Y., 1901). The last case, in addition to theater chairs, involved mirrors forming a

part of the walls, and pumping engines bolted to the floor, and their connections. Security T. Co. v. Temple Co., 58 Atl., 865 (N. J. Ch., 1904).]

[So, of steam-pipes, floors and partitions. Phoenix Mills v. Miller, 17 N. Y. Supp., 158 (1891), aff'g 4 N. Y. St. R., 787, 790 (1886).]

[So, of tile hearths bedded in cement; and a smoke-jack. Nisbet v. Mitchell-Innes (1880), 17 Scot. Law Rep., 438.]

[So, of an office desk about twenty-five feet long, so placed that the ends fitted against projections against the wall in such a manner that the space behind the desk formed a hotel office, each end of the desk being fastened to the wall by means of screws. Capehart v. Foster, 61 Minn., 132, 134 (1895). See Towson v. Smith, 13 App., D. C., 48 (1898).]

[So, of mats, nailed to the floors, an oil-cloth nailed to the stair-case, and punkahs fixed to and depending from the ceiling by ropes and screws. Brown v. Herriott, 1 Kyshe, 43, 51 (Straits Set., 1842). The decision in this case seems to have been influenced by a custom.]

[So, of one-half of a party-wall. Goldschmid v. Starring, 16 D. C., (5 Mackey), 582 (1887); Sherred v. Cisco, 6 N. Y. Super., 480, 489 (1851); Kinnear v. Moses, 32 Wash., 215, 217 (1903); or the entire wall if it stands upon the ground conveyed. Smith v. Martin, 4 Ky. L. R., 442 (1882).]

[So, of a fence. Hereford v. Pusch, 68 Pac., 546, 550 (Ariz., 1902); Graham v. Roark, 23 Ark., 19, 23 (1861); Knox v. Brotherton, 14 N. S. W., Supr. Ct., 185 (1875); see, also, Bagley v. Rose Hill Sugar Co., 111 La., 249 (1903); Carro v. Tucker, 2 Tex. Ct. of App., Civ., § 455 (1884).]

[So, of stone-curbing around a burial lot, and a monument cemented to a stone foundation, built for ornamentation in a cemetery. Oakland Cem. Co. v. Bancroft, 161 Pa. St., 197 (1894).]

[So, of a windmill. Vaughn v. Grigsby, 8 Colo. App., 373, 374 (1896).]

[So, of a galvanized iron cistern above ground. Siemers v. Hunt, 28 Tex. Civ. App., 44 (1902).]

[So, of marble vases cemented to pedestals firmly fixed in the ground in front of a house. Skinner v. Bowen, 13 Viet., 481 (1887). But see Nisbet v. Mitchell-Innes (1880), 17 Scot. Law Rep., 438, 440.]

[So, of platform scales, Arnold v. Crowder, 81 Ill., 56 (1876); Thomson v. Smith, 111 Iowa, 718, 724 (1900); Knickerbocker Trust Co. v. Penn Cordage Co., 62 N. J. Eq., 624 (1901); Watson v. Watson Mfg. Co., 30 N. J. Eq., 483 (1879).]

[So, of a hay fork, consisting of a track bolted to the barn roof, and the truck, pulleys and rope. McCarthy v. McCarthy, 20 Can. Law T., Occ. N., 211, 212 (Co. Ct., Ont., 1900).]

[So, of dynamos, exciters, an electric annunciator, and electric wiring. Temple Co. v. Penn Mut. Ins. Co., 54 Atl., 295, 296 (N. J., 1903); Security Trust Co. v. Temple Co., 58 Atl., 865 (N. J. Ch., 1904); New York Security Co. v. Saratoga Light Co., 95 Supr. Ct. (88 Hun), 569, 591 (N. Y., 1895); Capehart v. Foster, 61 Minn., 132, 134 (1895); Berliner v. Piqua Club, 66 N. Y. Supp., 791 (1900); Seiberling v. Miller, 106 Ill. App., 190, 193 (1902), aff'd 207 Ill., 443 (1904). In Temple Co. v. Penn Mut. Ins. Co., *supra*, a range was also included; in Berliner v.

Piqua Club, an iron filter; and in Seiberling v. Miller, heaters and iron smoke stacks. A mortgage of a lot upon which a power house is located, covers the wires connected with the power house and the poles in the city streets, upon which such wires are strung, all forming an electric light plant; and this is so though the line of poles and wires extend into another borough. Driesbach v. Ross, 195 Pa. St., 278 (1900); Fechet v. Drake, 2 Ariz., 239 (1887).]

[So, of a railroad embankment and riprapping. VanHusen v. Omaha B. & T. R'y Co., 118 Iowa, 366, 378 (1902); Omaha B. & T. R'y Co. v. Whitney, 99 N. W., 525 (Neb., 1904).]

[Stone passes to the grantee, whether imbedded in the soil, or gathered in rows to enable the land to be cultivated. Ellis v. Wren, 84 Ky., 254 (1886).]

But a mortgage executed by an agent, which is inoperative as to real estate on account of want of proper authority on the part of the agent, and also the absence of a ratification of his acts, is also inoperative as to articles which are so annexed as to be fixtures as between mortgagor and mortgagee. Despatch Line of Packets v. Bellamy Manf'g Co., 12 N. H., 205 (1841).

The converse of the rule stated in the text is to some extent true; thus, it is held that land may pass by a deed which does not contain any description of the land, but which grants only the structure which is erected upon it; so that a grant of a barn, a shop, a house, a well, or a mill, will convey a title to the land under it and necessary to its enjoyment and use. Greenwood v. Murdock, 9 Gray, 20 (1857); Cheshire v. Shutesbury, 7 Met., 566 (1844); Forbush v. Lombard, 13 Met., 109 (1847); Johnson v. Rayner, 6 Gray, 110 (1856); Blake v. Clarke, 6 Me., 436 (1830); Sherman v. Williams, 113 Mass., 481 (1873). See, also, Gear v. Barnum, 37 Conn., 229 (1870). [Pottkamp v. Buss, 31 Pac., 1121, 1222 (Cal., 1892); Wilds v. Ward, 138 Ind., 373, 376 (1894); City of Crawfordsville v. Boots, 76 Ind., 32, 34 (1881); Hatch v. Brier, 71 Me., 542 (1880); Cunningham v. Webb, 69 Me., 92, 95 (1879); Webster v. Potter, 105 Mass., 414, 415 (1870); Esty v. Currier, 98 Mass., 500, 501 (1868); Bacon v. Bowdoin, 39 Mass., 401, 406 (1839); 43 Mass., 591, 598 (1841); Bawden v. Hunt, 123 Mich., 295, 297 (1900); Davis v. Handy, 37 N. H., 65, 71 (1858); Bean v. Brackett, 34 N. H., 102, 119 (1856); Gibson v. Brockway, 8 N. H., 465, 470 (1837); Wade v. Odle, 21 Tex. Civ. App., 656, 660 (1899); Wilson v. Hunter, 14 Wis., 683, 687 (1861); see, also, Board of Education v. State, 64 Kan., 6, 12 (1902); Woodman v. Smith, 53 Me., 79, 81 (1865); State v. Hannibal, &c., R. R. Co., 135 Mo., 618, 644 (1896); Ogden v. Jennings, 62 N. Y., 526 (1875); Stone v. Thaden, 10 N. Y. Supp., 236, 237 (1890); Fisk v. Brayman, 21 R. I., 195, 198 (1899); Roby v. University, 36 Vt., 564, 565 (1864). The rule is the same under a sale on execution. Dean v. Pyncheon, 3 Chand., 9, 19 (Wis., 1850); and an attachment of a dwelling-house carries the land. Marston v. Stickney, 58 N. H., 609, 610 (1879). Likewise, a devise of a building carries the land. Richmond v. State, 5 Ind., 334, 337 (1854); Rogers v. Smith, 4 Pa. St., 93,

101 (1846); Whitney v. Olney, 3 Mason, 280, 281 (U. S. C. C., R. I., 1823). The same rule applies in the case of a mechanics' lien. Strang v. Pray, 89 Tex., 525, 528 (1896). Likewise, a mortgage of a building by a lessee carries the leasehold interest. Cross v. Weare Commission Co., 153 Ill., 499, 510 (1894); French v. Prescott, 61 N. H., 27, 29 (1881); and a lease of a building includes the land. Humiston v. Wheeler, 175 Ill., 514, 518 (1898); Hooper v. Farnsworth, 128 Mass., 487, 488 (1880); Chesebrough v. Pingree, 72 Mich., 438, 443 (1888); Lanpher v. Glenn, 37 Minn., 4 (1887); Nashville, C. & St. L. R'y v. Heikens, 79 S. W., 1038, 1040 (Tenn., 1904); but the lessee of the "first floor" has no right in the land beyond the right to have his flat sustained by the subjacent land. Lieferman v. Osten, 167 Ill., 93, 99 (1897). Likewise, an exemption from taxation of a building extends to the land. Cassiano v. Ursuline Acad., 64 Tex., 673 (1885); Gerke v. Purcell, 25 Ohio St., 229, 248 (1874). An exception or a reservation of a building in a grant of land includes the land upon which it stands. Stirman v. Cravens, 33 Ark., 376, 384 (1878); Allen v. Scott, 38 Mass., 25, 29 (1838); see, also, Sanborn v. Hoyt, 24 Me., 118 (1844), as to the effect of excepting and reserving buildings upon a considerable tract of land. See Meeks v. Willard, 57 N. J. Law, 22, 25 (1894), that the conveyance of a building carries the land thereunder to the line of the eaves. Where applicant for insurance of a building permanently annexed to the freehold, represents that he is the owner in fee simple, he unquestionably warrants that he had such title to the land upon which the building is situated. Pangborn v. Continental Ins. Co., 62 Mich., 638, 640 (1886). Where all right, title and interest in and to "all the buildings, tanks, derricks, pipes, pipe lines, fixtures, and all other personal property whatsoever" situated upon oil lands, were "granted, bargained, sold," the deed carries the right to operate the same in the manner before operated, with the right to use the soil. Dietz v. Mission Co., 95 Cal., 92, 100 (1892). But in Green Bay Canal Co. v. Hewitt, 66 Wis., 461 (1886), it was *held* that where the grantor of an undivided one-half of a tract of land reserved "all buildings and improvements," the exception extended to the land only so far as its temporary use was necessary to the enjoyment of the buildings. Especially was this so where there is uncertainty as to what the reservation included.]

Plaintiff conveyed to defendants as trustees a tract of land with a building thereon for school purposes with a provision in the deed to the effect that, if the design should prove unsuccessful, the trustees should by resolution so declare, and thereupon the property should revert to the plaintiff. Defendants made an addition attached to the main building in such a manner that it constituted a part of the main building, and caused the whole to be insured for $2,000. The building was destroyed by fire, and the loss paid to the trustees, who after the fire passed the resolution above referred to and also reconveyed the premises. *Held*, that the parties held the addition by the same tenure as the main building, that the insurance covered both it and the main building, and that plaintiff was entitled to this insurance. Hawes v. Lathrop, 38 Cal., 493 (1869).

*ing to indicate a contrary intention.[1] And it makes no [*276] difference that the conveyance is by virtue of legal process, as

[Under an executory contract for the conveyance of a store with the fixtures therein, the grantee is not bound to accept a conveyance after the fixtures have been removed. Smyth v. Sturges, 13 Abbott's New Cas., 75 (N. Y., 1883).]

[Where a first and second mortgage had been given of land upon which were furnaces for smelting ores, the second mortgagee claimed the precious metals which had become imbedded in the brick work in the process of smelting, and the right to take and grind the bricks in order to extract such metal. *Held*, that the furnaces as they stood, as well as subsequent additions, passed to the first mortgagee when he entered and sold, and the second mortgagee had no rights therein. Tottenham v. Swansea Ore Co. (1885), 52 Law T. R., 738.]

[A mortgage covers immovables by nature and by destination. Williamson v. Richardson, 31 La. Ann., 685, 686 (1879); Maginnis v. Union Oil Co., 47 La. Ann., 1489, 1497 (1895).]

See, also, *post* in this chapter, under the head, Bankruptcy, for further examples of fixtures passing by mortgage of the land; also Pierce v. George, 108 Mass., 78 (1871); Wiltshear v. Cottrell, 1 Ell. & Bl., 674 (1853); Rogers v. Crow, 40 Mo., 91 (1867); Ryall v. Rolle, 1 Atk., 165 (1749); Theurer v. Nautre, 23 La. Ann., 749 (1871); Citizens' Bank v. Knapp, 22 id., 117 (1870).

[See, generally, as to fixtures passing with a grant of the land, Stead v. Knowles, 79 Ala., 446, 448 (1885); Newland v. Baker, 26 Kan., 341, 345 (1881); Chase v. Wingate, 68 Me., 204, 205 (1878); Southbridge Bank v. Mason, 147 Mass., 500 (1888); *Re* Mayor of New York, 39 App. Div., 589, 595 (N. Y., 1899); Wilson v. Steel, 13 Phila., 153 (1879); *Re* Perkins' Est., 26 Atl., 637 (Vt., 1893); *Re* Yates (1888), 38 Ch. D., 112. For the same rule in regard to growing crops, see, *ante*, p. *252.]

[1] Colgrave v. Dias Santos, 2 B. & C., 76 (1823); *Ex parte* Belcher, 4 Dea. & Chit., 714 (1835), where Erskine, C. J., criticises *Ex parte* Quincy, 1 Atk., 477 (1750); *Ex parte* Price, 2 Mont. Dea. & DeG., 518 (1842); Walmsley (or Walmisley) v. Milne, 7 C. B. (N. S.), 115 (1859); Mather v. Fraser, 2 Kay & J., 552 (1856); Union Bank v. Emerson, 15 Mass., 159 (1818); Meyer v. Betz, 3 Robt. (N. Y.), 172 (1865). [See *post*, p. *311. Sword v. Low, 122 Ill., 487, 502 (1887); Richards v. Gilbert, 116 Ga., 382, 385 (1902); Horn v. Indianapolis Nat. Bank, 125 Ind., 381, 389 (1890); Omaha B. & T. R'y Co. v. Whitney, 99 N. W., 525 (Neb., 1904); Bennett v. Bagley, 29 Supr. Ct. (22 Hun), 408, 410 (N. Y., 1880); Shelton v. Ficklin, 32 Gratt., 727 (Va., 1880); First Nat. Bank of Braddock v. Hyer, 46 W. Va., 13 (1899); *Re* Trethowan (1877), 5 Ch. D., 559.]

When the land and the article annexed thereto are held by different titles and in different interests, the annexation is held to be personalty, and hence not to pass by a mortgage of the interest in the land not mention-

ing the thing annexed. Adams v. Lee, 31 Mich., 440 (1875), cited *ante* p. *46. [Borland v. Hahn, 25 N. Y. Supp., 131 (1893); see, also, Merchants' Nat. Bank v. Stanton, 59 Minn., 532, 537 (1894). While machinery annexed by a firm to real estate owned by a partnership, becomes part of it, if the real estate owned by the partners as tenants in common is not partnership property, the firm would have the same right of removal as a tenant. "The same reasons exist for encouraging the partners to make the best possible use of their possession, by protecting them in their expenditures upon the land so far as it may be consistent with justice to others; and neither the owners of the fee nor their creditors are wronged by the removal of the fixtures, any more than they would be if the occupant had with them no relations whatever but those of tenancy." Robertson v. Corsett, 39 Mich., 777, 784 (1878). Where the grantor of a lot owned machinery thereon in common with the owner of the adjoining lot, and such machinery was intended to be permanent and was used in connection with the adjoining lot, and was very valuable in place, but of little value if removed, the grantee can insist upon its removal as against the adjoining lot-owner who claimed an easement, or that he owned the machinery as real estate. Grove v. Barclay, 12 Phila., 315 (1878). Where the equitable title to land is in one person, and the ownership of chattels in another, the latter do not pass. Henkle v. Dillon, 15 Ore., 610, 616 (1888). A manufacturing firm, consisting of two partners, occupied as tenants part of a building of which one of the partners was owner of an undivided interest. Subsequently the other partner bought the building, giving a mortgage to the grantors, and he afterwards bought the interests of the firm. *Held,* that the machinery, which was originally trade-fixtures, was not brought within the mortgage upon the entire interest therein being acquired by the mortgagor. Price v. Jenks, 14 Phila., 228 (1880). Where, after a mortgagee takes possession of a mill under a mortgage thereof given by a firm, one of the partners claims and is allowed to remove certain machinery as his own and retain it for two years, and, upon request, such partner reimburses the mortgagee for taxes paid by him upon such machines, the mortgagee waives all right to claim them as a part of the realty. Foster v. Prentiss, 75 Me., 279 (1883). Where land is mortgaged by those holding the legal title, and the machinery attached thereto is mortgaged by the equitable owner of the land in possession, there is essential unity of title so that the question of separate ownership can not affect the character of fixtures, one of the parties afterwards obtaining title to both the land and the machinery. Watson v. Watson Mfg. Co., 30 N. J. Eq., 483, 487 (1879). In London Loan Co. v. Pulford, 8 Ont. Pr., 150, 153 (1879), the rule that articles annexed do not pass with the land where they are held by different titles, is not followed.]

The case of Trappes v. Harter, 3 Tyrwh., 603 (1833); s. c., 2 Cr. & M., 153; 3 L. J. (N. S.), Exch., 24, seems to have been decided upon its own special facts, and upon the ground that it was not intended that the machinery in question should pass by the mortgage. See the case doubted, criticised and explained in Minshall v. Lloyd, 2 M. & W., 450, 456 (1837);

Wilde v. Waters, 16 C. B., 637, 647 (1855); Walmsley v. Milne, 7 C. B. (N. S.), 133, 134 (1859); Cullwick v. Swindell, L. R., 3 Eq., 249 (1866); *Ex parte* Barclay, 5 DeG. M. & G., 413 (1855); *Ex parte* Bentley, 2 M. D. & DeG., 597 (1842).

[Where, by a clause in a deed conveying real estate, a boiler is expressly excepted from its operation, the vendee can not claim the boiler as a fixture. Badger v. Batavia Paper Mfg. Co., 70 Ill., 302, 306 (1873).]

[Where the intention is that the grantee shall only take the interest of his grantor to machinery and fixtures, as is shown by a clause in the deed, he acquires no title to machines which, as between the grantor and a third party, belong to the latter. Foster v. Prentiss, 75 Me., 279 (1883).]

[A grantee of land who is notified that boilers thereon had never been paid for, and who does not pay an increased price on account of the boilers, can not claim them as against the seller from whom they have been obtained by fraud. Hacker v. Munroe, 61 Ill. App., 420, 425 (1895).]

[Where an engine and boiler were mortgaged and sold as chattels so as to give the purchaser a right to remove them as against the land owner, a purchaser of the land at execution sale acquires no greater right than the land owner. Sisson v. Hibbard, 75 N. Y., 542 (1879), aff'g 17 Supr. Ct. (10 Hun), 420 (1877).]

[Platform scales resting upon a foundation, eight by twelve feet, sunk three feet into the ground, were placed in the street in front of a lot by the owners thereof after obtaining consent of the village council. *Held*, that the necessity of permission to erect the scales, and the fact that they could only remain there during sufferance, was inconsistent with an intent to annex them permanently, and they did not become a part of the real estate, and did not pass to the grantee of the lot. O'Donnell v. Burroughs, 55 Minn., 91, 94 (1893).]

[Where a grantor knew that the house upon the premises was to be converted into a planing-mill, but took no steps to obtain a lien for unpaid purchase-money upon the machinery placed therein, only stipulating that the building should be kept insured and reserving a lien thereon, can not claim to have looked to the machinery as security when he did not know whether it would ever be annexed. Clore v. Lambert, 78 Ky., 224, 231 (1879).]

[Where, upon the conveyance and mortgage of land, it was orally agreed by all parties that a third party, advancing money to make the cash payment, should have a marine railway upon the land, the mortgagee acquires no right thereto although it would have been covered by the mortgage in the absence of such agreement. Tyson v. Post, 108 N. Y., 217 (1888), aff'g 22 N. Y. Wkly. Dig., 492 (Supr. Ct., 1885).]

[A mortgagee released property which was sufficient security for the debt, and took a mortgage upon vacant land in place thereof, which was not sufficient security, relying upon the erection of a stone building thereon by the mortgagors which would make it sufficient; but the mortgagors did not bind themselves to build. The mortgagors erected a frame

by a sale of the land on execution, the rule in such a case being the same as in the case of a private sale.[2] The rule is the same

building of little value, and placed machinery therein. *Held*, that there was no intention shown to make the machines part of the realty. The fact that instead of a stone building, a wooden building of as little value as possible was erected, would show a design to have machines placed therein remain chattels. Keefer v. Merrill, 6 Up. Can. App., 121 (1881).]

[A tenant, having the right to remove trade-fixtures, purchased the land subject to a mortgage. *Held*, that, although the estate for years merged in the fee, it did not follow that the trade-fixtures, being chattels, became a part of the realty, so as to pass on foreclosure of the mortgage, but an intention would be presumed that they were personal property; and where the fixtures were mortgaged as chattels, and notice given at the foreclosure sale of the land, there was nothing to indicate a change of intention. Globe Marble Co. v. Quinn, 76 N. Y., 23 (1879).]

[Mill machinery was sold under an agreement that, although affixed to the freehold of the buyer, it was to remain the property of the seller until paid for. By farther agreement the buyer was to give a mortgage upon the land to secure the indebtedness, and to insure the buildings. The mortgage was given, and the buyer insured the building and machinery in his own name. The building and machinery being destroyed by fire, the mortgagor and mortgagee each claimed the insurance money on the machinery. *Held*, by a divided court, that, as the machinery was personal property between the parties, it was not covered by the mortgage, nor was the mortgagee entitled to any insurance money except that upon the building itself, as, under the agreement, the machinery was not a part of the building. Watrous Engine Co. v. McCann, 21 Ont. App., 486 (1894).]

[Where the state sold a canal, the purchasers taking a fee, the grant did not include a bridge over the canal, which formed a part of a public highway. Shirk v. Board of Commissioners, 106 Ind., 573 (1886).]

[The owner of a new subdivision placed water-mains in the streets thereof for the purpose of supplying it with water from a water works plant in the neighborhood. Subsequently the subdivision was vacated, and was sold as farming land. *Held*, that the grantee acquired no title to the water-mains. Dodge City Water Co. v. Alfalfa Land Co., 64 Kan., 247 (1902).]

[See, *post*, p. *316, as to the effect of notice to a grantee of land, of ownership by others of articles annexed thereto.]

[2] Oves v. Ogelsby, 7 Watts, 106 (1838); so *held* as against one levying upon the engine as personalty; Farrar v. Chauffetete, 5 Den., 529 (1848); Moore v. Smith, 24 Ill., 512 (1860); Trull v. Fuller, 28 Me., 545 (1848), a clapboard machine and shingle machine, fastened to the floor respectively by knees, and by spikes or nails, and keys; Strickland v. Parker, 54 Me., 263 (1866), where a marine railway (consisting of rails and sleepers, endless chain, gear, wheels and ship-cradle), laid on earth and affixed thereto

*in the case of the conveyance or mortgage of a leasehold [*277] without mentioning the fixtures, which, though removable as against the landlord, pass unless a contrary intention appears.[3]

in the usual manner, the road-bed so far as one was required, being made of and by the earth, was *held* to be a fixture, and to pass by a levy and sale of real estate on execution. See, also, Symonds v. Harris, 51 Me., 14 (1862); Boyle v. Swanson, 6 La. Ann., 263 (1851). [Thomson v. Smith, 111 Iowa, 718, 719 (1900); Stillman v. Flenniken, 58 Iowa, 450, 454 (1882); see, also, Wilder v. Kent, 15 Fed., 217 (U. S. C. C., Pa., 1883); Keve v. Paxton, 26 N. J. Eq., 107 (1875), an engine and boiler resting upon foundations; *Re* Welch, 108 Fed., 367, 368 (U. S. Dist. Ct., N. Y., 1901), an engine, boiler, machinery and shafting, secured by cement, bolts or screws; Newhall v. Kinney, 56 Vt., 591 (1884), a circular saw mill; Whitney v. Huntington, 34 Minn., 458, 461 (1886), timber and buildings. For the same rule as to growing crops, see, *ante*, p. *253.]

Fixed machinery in a mill and everything so annexed to the freehold as to pass by a levy thereon, must be presumed in the absence of such a clear preponderance of testimony as will enable the court to find the contrary, to have been taken into consideration by the appraisers in estimating the value of the property under such levy. It is not necessary that appraisers should make a schedule and estimate each piece of machinery separately. Payne v. Farmers' and Citizens' Bank, 29 Conn., 415 (1861).

[Improvements upon land pass under an execution-sale although made with money secured by a mortgage after the judgment lien attached. Flynn v. Wilkinson, 56 Ill. App., 239, 241 (1894).]

[A purchaser of land at a tax-sale does not acquire the superstructure of a railroad thereon. Illinois Central R. R. Co. v. LeBlanc, 74 Miss., 650, 673 (1897).]

[3] See Longstaff v. Meagoe, 2 Ad. & Ell., 167 (1834); Williams v. Evans, 23 Beav., 239 (1856); Day v. Perkins, 2 Sandf. Ch., 359 (1845); Breese v. Bange, 2 E. D. Smith, 474 (1854); *Ex parte* Astbury, L. R., 4 Ch. App., 630, 637 (1869); s. c., 38 L. J. (N. S.), Bank., 9; 20 L. T. (N. S.), 997; 17 W. R., 997. See, also, Burton v. Brown, Cro. Jac., 648 (1622). [San Francisco Breweries v. Schurtz, 104 Cal., 420, 427 (1894); Commercial Bank v. Pritchard, 126 Cal., 600, 605 (1899); Fletcher v. Kelly, 88 Iowa, 475, 486 (1893); Gill v. Weston, 110 Pa. St., 312, 316 (1885); Weltman v. August, 11 Tex. Civ. App., 604, 605 (1895); Paterson v. Pyper, 20 Up. C., C. P., 278, 282 (1870); Davy v. Lewis, 18 U. Can., Q. B., 21; *Re* Lusty (1889), 60 Law T. R., 160; Bank of Victoria v. Langlands Co., 24 Vict., 230, 249 (1898); Colonial Bank v. Riley, 22 Vict. L. R., 288, 296 (1896); Australian Bank v. Colonial Corp., 15 N. S. W. L. R., 464 (1894); see, also, Towson v. Smith, 13 App., D. C., 48, 56 (1898); Warner v. Don, 26 Can., 388 (1896), aff'g Don v. Warner, 28 Nova S., 202, 204 (1896); Reynolds v. Ashby [1903], 1 K. B., 87.]

See, however, *dictum* of Malins, V. C., in Begbie v. Fenwick, L. R., 8 Ch. App., 1075, 1076, note; s. c., 24 L. T. (N. S.), 58; 25 L. T. (N. S.),

441; Blackburn and Lush, JJ., in Hawtry v. Butlin, 21 W. R., 633 (1873); s. c., 42 L. J. Q. B., 163; L. R., 8 Q. B., 290; 28 L. T. (N. S.), 532.

[But the mortgagee is only entitled to the use of the fixtures during the term. Southport Baking Co. v. Thompson (1887), 37 Ch. D., 64.]

[A frame warehouse, forty by one hundred feet, with concrete foundation, will be presumed to rest upon the land, and be real estate within Secs. 658 and 660 of the Civ. Code, which provide that a thing is deemed to be affixed to land when it is permanently resting upon it, and that which is affixed to land is real property. Commercial Bk. v. Pritchard, 126 Cal., 600, 605 (1899).]

[A building erected by a tenant, whether or not he has a right of removal, attaches to the leasehold, and is subject to a lien of a judgment which is prior to a chattel mortgage of the building. Hayden v. Goppinger, 67 Iowa, 106, 107 (1885).]

[A one and one-half story frame house erected by a tenant under an agreement giving him the right of removal, attaches to the leasehold so as to give him a homestead therein, although the house is mortgaged and taxed as personal property. Hogan v. Manners, 23 Kan., 551 (1880).]

But "where a stipulation is made that fixtures are to be taken at a valuation, that shows that they are not otherwise to pass." Per Best, J., in Colegrave v. Dias Santos (*supra*).

The acceptance of a demise of a house containing fixtures does not raise an implied promise to pay for such fixtures. Where a house is let containing fixtures, it will be a question whether they are let as a part of the house or delivered upon a separate contract of sale. Goff v. Harris, 5 Man. & G., 573 (1843). [See Lewis v. Seabury, 74 N. Y., 409 (1878).]

But in the absence of an agreement to the contrary, a tenant leasing premises to which fixtures are attached at the time of the demise, is entitled to the possession of the premises at the specified time in the same condition in which they were demised; and if the lessor wrongfully removes such fixtures (a cistern in this case) before the term is to commence, leaving the house unfit for habitation, the lessee may refuse to take possession and to pay the rent. Cleves v. Willoughby, 7 Hill, 83 (1845). [See, also, Emery v. Fugina, 68 Wis., 505 (1887); Cameron v. Tarratt, 1 Up. Can., Q. B., 312.]

[If the landlord removes fixtures before the tenant takes possession, he is responsible in an action of tort. Sachs v. Henderson [1902], 1 K. B., 612.]

[A lessee of mines and minerals, being entitled to use the surface for all incidental purposes, is not entitled to use houses and engines thereon which are the property of the lessor. Hayles v. Pease (1899), 68 L. J. Ch., 222.]

[Cases, ten feet high and thirty feet long, containing drawers below and shelving and mirrors above, nailed to the wall, and corresponding in color to the woodwork of the room, were in a room at the time a lease thereof was made. *Held*, not to pass under the lease although, when removed, it left the wall back of them without paint or baseboard, and somewhat broken. Kimball v. Grand Lodge, 131 Mass., 59 (1881).]

*In like manner tenant's fixtures, though removable by [*278] the tenant as against the landlord at the end of the term, pass as a part of the security by the deposit of a lease by way of equitable mortgage, although they are not mentioned in the *memorandum of deposit.[1] And it makes no difference [*279] that the fixtures are of the kind called trade fixtures, that circumstance being of importance only in questions depending be-*tween landlord and tenant, and having no effect upon [*280] those arising between mortgagor and mortgagee; and the rule is the same in this respect whether the mortgage be in fee, by way of lease for a term of years, or of a leasehold interest only.[2] So, it makes no difference that such fixtures have been erected since the execution or deposit of the lease by way of

[1] *Ex parte* Cowell, 12 Jur., 411 (1848); *Ex parte* Broadwood, 1 Mont. Dea. & DeG., 631 (1841); *Ex parte* Tagart, DeG., 531 (1847); Meux v. Jacobs, L. R., 7 Eng. & Ir. App., 481 (1875); s. c., 44 L. J., Ch., 481; 23 W. R., 526; 22 W. R., 609 (n).

The rule is the same where there is simply a deposit of the lease unaccompanied by any memorandum. Williams v. Evans, 23 Beav., 239 (1856).

[Where there are no words used dealing expressly with fixtures they pass to the mortgagee, because they are considered to be part of the land, and the same interest must pass in them, and no more, as passes in the land itself. Hence, where a tenant mortgaged his term, and afterwards made an assignment for the benefit of his creditors, and his assignee sold the fixtures, the mortgagee is not entitled to the proceeds, as he had no more interest in the fixtures than in the land. Colonial Bank v. Riley, 22 Viet. L. R., 288 (1896).]

[2] 21 H. 7, 26 b (1506); *Ex parte* Broadwood (*supra*); *Ex parte* Belcher, 2 Mont. & Ayr., 166 (1835); s. c., 4 Dea. & Chit., 703; 4 L. J. (N. S.), Bank., 29; Climie v. Wood, L. R., 3 Exch., 257; s. c., 37 L. J. (N. S.), Exch., 158; 18 L. T. (N. S.), 609; L. R., 4 Exch., 328 (1869); 38 L. J. (N. S.), Exch., 223; 20 L. T. (N. S.), 1012; Meux v. Allen, 22 W. R., 609, note (1874); Longbottom v. Berry, L. R., 5 Q. B., 123 (1869); s. c., 39 L. J. (N. S.), Q. B., 37; 10 B. & S., 584; 22 L. T. (N. S.), 385; Walmsley (or Walmisley) v. Milne, 7 C. B. (N. S.), 115 (1859); 6 Jur. (N. S.), 125; 1 L. T. (N. S.), 62; 29 L. J. C. P., 97; 23 Month. Law Rep., 630; 8 Am. Law Reg., 373; *Ex parte* Price, 2 Mont. Dea. & DeG., 518 (1842); Cullwick v. Swindell, L. R., 3 Eq. Ca., 249 (1866); Holland v. Hodgson, L. R., 7 C. P., 328 (1872); Day v. Perkins, 2 Sandf. Ch., 359 (1845); Oves v. Ogelsby, 7 Watts, 106 (1838); Moore v. Smith, 24 Ill., 512 (1860), holding that trade fixtures pass by a sale of property under a decree to enforce a mechanics' lien, unless reserved. See s. c., 26 Ill., 392; Powell v. Striker, Sup. Ct. N. Y., 12 Law Reporter, 366 (1849); Harkness v. Sears, 26 Ala., 493 (1855). See, also, Millikin v. Armstrong, 17 Ind., 456 (1861); Heer-

[*281] *mortgage.[3] Indeed, it is a general rule that fixtures annexed subsequently to the execution of the mortgage become a part of the mortgage security and bound thereby.[4] And hence (at least in those States where a mortgage is considered a conveyance of the land and not a mere security), they may not

mance v. Vernoy, 6 John., 5 (1810); Teaff v. Hewitt, 1 Ohio St., 535 (1853); Farrar v. Chauffetete, 5 Den., 527, 531 (1848), and *post* in this chapter in note. [*Re* Mayor of New York, 39 App. Div., 589, 595 (N. Y., 1899); McDonald v. Weeks, 8 Gr. Ch., 297, 299 (Ont., 1860); London Loan Co. v. Pulford, 8 Ont. Pr., 150, 152 (1879); *Re* Calvert [1898], 2 I. R., 501, 505; Southport Banking Co. v. Thompson (1887), 37 Ch. D., 64; see, also, McCrillis v. Cole, 55 Atl., 196, 197 (R. I., 1903); Paine v. McDowell, 71 Vt., 28, 32 (1898); Tottenham v. Swansea Ore Co. (1885), 52 Law T. R., 738, 739.]

[3] *Ex parte* Broadwood; Meux v. Jacobs; *Ex parte* Belcher (*supra*); McCluney v. Lemon, Hayes, 154 (1831).

[Where the mortgagor of a leasehold attorned to the mortgagee and afterwards annexed fixtures, *held*, that the attornment was for further security, and that the fixtures were added in the capacity of mortgagor and not as tenant, and passed to the mortgagee. *Ex parte* Punnett (1880), 16 Ch. D., 226.]

[As between a mortgagee of a leasehold and all fixtures "hereafter to stand or to be upon the said premises," and a seller reserving title to fixtures subsequently annexed, the fixtures are not covered by the mortgage. Cumberland Banking Co. v. Maryport Iron Co. [1892], 1 Ch., 415.]

[4] Besides the authorities above cited, see Walmsley v. Milne, 7 C. B. (N. S.), 115 (1859); Ackroyd v. Mitchell, 3 L. T. (N. S.), 236 (1860); Roberts v. Dauphin, etc., Bank, 19 Penn. St., 71 (1852); Bowen v. Wood, 35 Ind., 268 (1871); Gardner v. Finley, 19 Barb., 317 (1855); Hutchings v. Lathrop, Sup. Ct. Vt. (1845), 8 Law Rep., 82; Snedeker v. Warring, 12 N. Y., 170 (1854); Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal., 631 (1863); Burnside v. Twitchell, 43 N. H., 390 (1861); Sands v. Pfeiffer, 10 Cal., 258 (1858); Smith v. Goodwin, 2 Me., 173 (1822); McKim v. Kennedy, 3 Md. Ch. Dec., 186 (1852), so *held* as between mortgagee and parties claiming a mechanics' lien, who were postponed to the prior mortgage; *Ex parte* Price, 2 Mont. Dea. & DeG., 518 (1842); Cullwick v. Swindell, L. R., 3 Eq. Ca., 249 (1866).

In like manner, fixtures erected upon land by the debtor, after a sale under execution, and before the execution of the sheriff's deed, pass with the land to the purchaser. Hayes v. N. Y. Mining Co., 2 Col., 273 (1874).

[The following cases sustain the rule laid down in the text: Galveston R. R. v. Cowdrey, 78 U. S., 459, 482 (1870); Seedhouse v. Broward, 34 Fla., 509, 523 (1894); Williams v. Chicago Exhib. Co., 188 Ill., 19, 29 (1900); Cable v. Ellis, 120 Ill., 136, 153 (1887); Wood v. Whelen, 93 Ill., 153, 169 (1879); Matzon v. Griffin, 78 Ill., 477, 480 (1875); Mann v.

Mann, 49 Ill. App., 472, 482 (1893); Powell v. Rogers, 11 Ill. App., 98, 103 (1882); Hamilton v. Huntley, 78 Ind., 521, 527 (1881); Travellers Ins. Co. v. Patten, 98 Ind., 209, 216 (1884); Marshall v. Stewart, 80 Ind., 189, 195 (1881); Catterlin v. Armstrong, 79 Ind., 514, 522 (1881); Mutual Benefit Ins. Co. v. Huntington, 57 Kan., 744, 749 (1897); Bank of Louisville v. Baumeister, 87 Ky., 6, 15 (1888); Harris v. Youngstown Bridge Co., 90 Fed., 322, 332 (U. S. C. C. A., Ky., 1898); N. O. Nat. Bank v. Raymond, 29 La. Ann., 355, 358 (1877); Lee v. Kendall, Manning (La.), 19, 20; Citizens Bank v. Maureau, 37 La. Ann., 857, 861 (1885); Payne v. Anderson, 35 La. Ann., 977, 979 (1883); Phinney v. Day, 76 Me., 83, 85 (1884); Wight v. Gray, 73 Me., 297 (1882); Humphreys v. Newton, 51 Me., 40, 51 (1863); *Re* Holland, 2 Haskell, 90, 92 (U. S. Dist. Ct., Me., 1876); Smith Paper Co. v. Servin, 130 Mass., 511, 513 (1881); National Bank of Sturgis v. Levanseler, 115 Mich., 372, 377 (1897); Merchants Bank v. Stanton, 62 Minn., 204, 205 (1895); Ivy v. Yancey, 129 Mo., 501, 510 (1895); State Sav. Bank v. Kercheval, 65 Mo., 682 (1877); Johnston v. Morrow, 60 Mo., 339 (1875); Dutro v. Kennedy, 9 Mont., 101, 107 (1889); Bean v. Brackett, 34 N. H., 102, 118 (1856); Tate v. Field, 57 N. J. Eq., 53, 55 (1898); Delaware, L. & W. R. R. Co. v. Oxford Iron Co., 36 N. J. Eq., 452, 455 (1883); Mutual Life Ins. Co. v. Dowden, 3 Atl., 351 (N. J. Ch., 1885); Jackson *ads.* Turrell, 39 N. J. Law, 329, 331 (1877); McFadden v. Allen, 134 N. Y., 489, 491 (1892), aff'g 57 Supr. Ct. (50 Hun), 361 (1888); Hart v. Sheldon, 41 Supr. Ct. (34 Hun), 38, 40 (N. Y., 1884); Sullivan v. Toole, 33 Supr. Ct. (26 Hun), 203, 204 (N. Y., 1882); Cooper v. Harvey, 16 N. Y. Supp., 660, 663 (1891); Phoenix Mills v. Miller, 4 N. Y. St. R., 787, 790 (1886); Rice v. Dewey, 54 Barb., 455, 472 (N. Y., 1862); Clark v. Hill, 117 N. C., 11, 12 (1895); Foote v. Gooch, 96 N. C., 265, 270 (1887); Browne v. Davis, 109 N. C., 23, 28 (1891); Inverarity v. Stowell, 10 Ore., 261, 264 (1882); Muehling v. Muehling, 181 Pa. St., 483, 491 (1897); Morris's App., 88 Pa. St., 368, 384 (1879); Oakland Cem. Co. v. Baneroft, 161 Pa. St., 197, 199 (1894); Annely v. DeSaussure, 12 S. C., 488, 519 (1879); Heath v. Haile, 45 S. C., 642, 648 (1895); Bermea Lumber Co. v. Adoue, 20 Tex. Civ. App., 655, 660 (1899); Kendall v. Tracy, 64 Vt., 522, 527 (1892); Hinckley Iron Co. v. James, 51 Vt., 240, 244 (1878); Graeme v. Cullen, 23 Gratt., 266, 289 (Va., 1873); Gunderson v. Swarthout, 104 Wis., 186 (1899); Homestead Land Co. v. Becker, 96 Wis., 206, 213 (1897); Rogers v. Ontario Bank, 21 Ont., 416, 418 (1891); Dickson v. Hunter, 29 Gr. Ch., 73, 80 (Ont., 1881); McQuesten v. Thompson, 2 Up. Can. Er. & App., 167, 182 (1862); Monti v. Barnes [1901], 1 K. B., 205, 208; Irish Bldg. Soc. v. Mahony (1876), 10 Irish R. Law, 363; see, also, Reyman v. Henderson Nat. Bank, 17 Ky. L. R., 1291 (1896); Citizens Bank v. Miller, 44 La. Ann., 199, 205 (1892); Brooks v. Prescott, 114 Mass., 392, 397 (1874); New York Security Co. v. Saratoga Light Co., 95 Supr. Ct. (88 Hun), 569 (N. Y., 1895); Hislop v. Joss, 3 Ont. Law, 281, 283 (1901); Philion v. Bisson, 23 Low. Can. Jur., 32 (Super., 1878); Cross v. Barnes (1877), 46 L. J., Q. B., 479, 480; Cunningham v. Seaboard Realty Co., 58 Atl., 819 (N. J. Ch., 1904).]

[In the following cases the mortgage on the land was held to attach to fixtures subsequently annexed as against an unpaid seller of the fixtures who had reserved title: Porter v. Pittsburg Steel Co., 122 U. S., 267, 283 (1887), denying a rehearing of 120 U. S., 649, 671 (1886); Watertown Steam Engine Co. v. Davis, 5 Houston, 192, 211 (Del., 1877); Cunningham v. Cureton, 96 Ga., 489, 492 (1895); Fifield v. Farmers Bank, 47 Ill. App., 118 (1892); Bass Foundry Works v. Gallentine, 99 Ind., 525 (1884); Hamilton v. Huntley, 78 Ind., 521, 527 (1881); Evans v. Kister, 92 Fed., 828, 836 (U. S. C. C. A., Ky., 1899); Phoenix Iron Co. v. New York Trust Co., 83 Fed., 757 (U. S. C. C. A., Ky., 1897); New York Trust Co. v. Capital R'y Co., 77 Fed., 529 (U. S. C. C., Ky., 1896); Westinghouse Elec. Mfg. Co. v. Citizens Street R'y Co., 24 Ky. L. R., 334 (1902); Roddy v. Brick, 42 N. J. Eq., 218, 222 (1886); Wade v. Donau Brew'g Co., 10 Wash., 284, 289 (1894); Fuller-Warren Co. v. Harter, 110 Wis., 80 (1901); Ontario Car Co. v. Farwell, 18 Can., 1 (1890); Oates v. Cameron, 7 Up. Can., Q. B., 228, 232; *Re* New South Wales Cold Storage Co., 12 N. S. W. L. R. (Eq.), 87 (1891); see, also, McCrillis v. Cole, 55 Atl., 196 (R. I., 1903); Laine v. Beland, 26 Can., 419 (1896), aff'g Beland v. Laine, 4 Q. B., 354 (Que., 1895).]

[In the following cases the lien of the mortgage was held to be superior to a mechanics' lien: Monticello Bank v. Sweet, 64 Ark., 502 (1897); Fletcher v. Kelly, 88 Iowa, 475, 490 (1893); Getchell v. Allen, 34 Iowa, 559 (1872); Lee v. Kendall, Manning (La.), 19, 20; Schulenburg v. Hayden, 146 Mo., 583 (1898); Russell v. Grant, 122 Mo., 161, 175 (1894); Hoagland v. Lowe, 39 Neb., 397 (1894); Heidelbach v. Jacobi, 28 N. J. Eq., 544 (1877); Citizens Nat. Bank v. Strauss, 29 Tex. Civ. App., 407, 412 (1902); Jessup v. Stone, 13 Wis., 466, 471 (1861); see, also, Choteau v. Thompson, 2 Ohio St., 114, 127 (1853). Where a holder of a mechanics' lien upon a lot purchases it at a sale on foreclosure thereof, and builds a house thereon, and a writ of error is subsequently sued out by one who held a mortgage upon the lot at the time of such sale, and the decree of sale is reversed, the mortgagee is entitled to the benefit of the improvements. Powell v. Rogers, 11 Ill. App., 98, 103 (1882). In some states, by statute, the claim of mechanics is superior to that of the mortgagee.]

[The rule is the same in the case of a vendor's lien upon land, which attaches to all improvements afterwards placed thereon which become a part of the freehold. Louisville Bldg. Ass'n v. Korb, 79 Ky., 190, 197 (1880); Simpson v. Masterson, 31 S. W., 419 (Tex. Civ. App., 1895); Charleston Lumber Co. v. Brockmyer, 18 W. Va., 586, 592 (1881). A vendor's lien upon land attaches to a house built thereon, and renders an insurance policy upon such house void under a provision in the policy against incumbrances. Curlee v. Texas Home Ins. Co., 73 S. W., 831 (Tex. Civ. App., 1903). A vendor's lien is superior to a mechanics' lien. Watson v. Markham, 77 S. W., 660, 661 (Tex. Civ. App., 1903).]

[The rule stated in the text holds as against one letting machinery under a hire purchase agreement. Reynolds v. Ashby [1903], 1 K. B., 87; or as against the owner of machinery which is delivered to the landowner for trial. Hamilton v. Huntley, 78 Ind., 521, 524 (1881). That the article is

not paid for is immaterial. Coleman v. Stearns Mfg. Co., 38 Mich., 30, 37 (1878).]

[Money advanced to pay arrears of wages of laborers who had become riotous and threatened to burn the hotel building erected, does not create a lien superior to a prior mortgage. Raht v. Attrill, 106 N. Y., 423 (1887).]

[Where money is borrowed from a bank for the purpose of purchasing machinery, and the borrower offers to give a chattel mortgage thereon, but the offer is not accepted until about a year after the machinery is annexed to mortgaged land, the bank can not claim the equities of a seller on condition, nor even of one who advances money relying upon a chattel mortgage of fixtures. Fisk v. People's Bank, 14 Colo. App., 21, 30 (1899).]

[Where a seller reserves title to machinery until paid, which is attached to mortgaged premises, it does not become a fixture as between him and the mortgagee unless the amount due is tendered, but does as between the mortgagee and all other persons, so that as soon as the machinery is paid for the mortgage lien is superior. Langdon v. Buchanan, 62 N. H., 657, 660 (1883).]

[The rule stated in the text applies even though the mortgagor has attorned as tenant to the mortgagee. *Ex parte* Punnett (1880), 16 Ch. D., 226.]

[Mere standing by and not assenting does not constitute implied assent, by the mortgagee, that he will not claim the benefit of improvements being made; otherwise every mortgagee would be deprived of the benefit of improvements which he saw being made. Watertown Steam Engine Co. v. Davis, 5 Houston, 192, 207 (Del., 1877); Catterlin v. Armstrong, 101 Ind., 258, 267 (1884).]

[''There is no material difference whether the chattel is attached before or after the execution of the mortgage; except that when the articles are annexed subsequently, and are of a doubtful nature, it seems that stronger evidence of intention that it is an accession to the freehold, is required, than when annexed at the time of the making of the mortgage.'' Tillman v. DeLacy, 80 Ala., 103, 105 (1885).]

[A mortgagor can not, by substituting new for old machinery, compel the mortgagee to take the mill in a dismantled condition. Bass Foundry Works v. Gallentine, 99 Ind., 525, 529 (1884); see, also, Rayman v. Henderson Nat. Bank, 98 Ky., 748, 751 (1896).]

[If the mortgagor purchases trade fixtures attached to the premises the same consequences result as if they were placed there for the first time, and they inure to the benefit of the mortgagee. London Loan Co. v. Pulford, 8 Ont. Pr., 150, 153 (1879). But see Belvin v. Raleigh Paper Co., 123 N. C., 138, 145 (1898), where it is held that if fixtures are conveyed by a lessee to his lessor, a mortgagor, who, as a part of the same transaction, gives a mortgage thereon to secure the purchase money therefor, the rights of the second mortgagee are superior to those of the mortgagee of the land.]

[The rule of the text applies especially in the case of a brick-yard, where there is constant diminution of value of the land by denuding it of its clay. Fisk v. Peoples Bank, 14 Colo. App., 21, 27 (1899).]

[Machinery placed in a paper-mill, which could not be removed without great depreciation, is a part of the freehold, and the premises, upon a sale under a deed of trust, should be sold entire. Hill v. National Bank, 97 U. S., 450 (1878); Hill v. Shoemaker, 8 D. C., 305, 310 (1874).]

[A house built by one of the mortgagors subsequent to the mortgage inures to the benefit of the mortgagee. Matzon v. Griffin, 78 Ill., 477, 480 (1875); but the rule does not apply where one co-tenant mortgages his share, and the other makes the improvements. Annely v. DeSaussure, 17 S. C., 389, 394 (1881). If one tenant in common places improvements upon the common property, his lien on his co-tenant's interest for a proportionate share of the increase in value caused by the improvements will pass under his mortgage of the property. Salem Nat. Bank v. White, 159 Ill., 136, 146 (1895). Where one tenant in common so conducts himself as to lead the mortgagee to think that his co-tenant is the sole owner, and consents to the erection of buildings upon the land with the money raised by the mortgage, the lien of the incumbrance attaches to his interest. Baird v. Jackson, 98 Ill., 78, 88 (1881). A tenant in common of land built a house thereon under an agreement with his co-tenant and a second mortgagee of the land that the builder could remove the house if the land was not paid for. Having insured the house as realty and unencumbered, *held*, that he could not recover from the insurance company for a loss. Phillips v. Grand River Ins. Co., 46 Up. Can. Q. B., 334 (1881).]

[The rule of the text does not apply where the mortgage expressly covers gas-pipes "already laid." Davidson v. Westchester Gas-Light Co., 99 N. Y., 558, 569 (1885).]

[However, a mortgagee is not entitled to the improvements placed upon land by a railroad company by consent of the owner, where condemnation proceedings are postponed. North Hudson R. Co. v. Booraem, 28 N. J. Eq., 450 (1877), overruling Booraem v. Wood, 27 N. J. Eq., 371; Dows v. Congdon, 16 How. Pr., 571 (N. Y., 1858); St. Johnsbury & L. C. R. R. Co. v. Willard, 61 Vt., 134 (1888); Aspinwall v. Chicago & N. W. R'y Co., 41 Wis., 474 (1877); Kennedy v. Milwaukee & St. P. R'y Co., 22 Wis., 581 (1868). But it is otherwise where the company has not filed any written location. Meriam v. Brown, 128 Mass., 391 (1880); or where track is laid upon mortgaged land which the company has purchased, but which it has no right to condemn. Price v. Weehawken Co., 31 N. J. Eq., 31 (1879); or where the company, being a party to the foreclosure suit, asserts no rights. Philadelphia, R. & N. E. R. R. Co. v. Bowman, 23 App. Div., 170 (1897), aff'd 163 N. Y., 572 (1900).]

[Where water-works were sold on execution subject to a mortgage, and possession given to the purchasers, who, pending litigation, put up an electric light line, additional mains and machinery to meet the public necessities, but upon the idea that they would have the right to remove such additions, upon foreclosure of the mortgage, the execution purchasers are entitled, out of the surplus left after the payment of the mortgage, to compensation to the extent that the price which the property brought

be removed or otherwise disposed of during the life of the mortgage, either by the mortgagor himself or one claiming under *him as vendee, assignee, etc., to whom, without the con- [*282] sent of the mortgagee, the mortgagor can confer no greater rights than he possesses himself.[1] The mortgagor in such a case

was enhanced by the removable betterments, although the mortgage expressly covered after acquired machinery. Georgetown Water Co. v. Fidelity Tr. Co., 78 S. W., 113 (Ky., 1904).]

1 Ackroyd v. Mitchell, 3 L. T. (N. S.), 236 (1860); McCluney v. Lemon, Hayes, 154 (1831), an execution creditor; Frankland v. Moulton, 5 Wis., 1 (1856), a chattel mortgage; Burnside v. Twitchell, 43 N. H., 390 (1861); Smith v. Goodwin, 2 Me., 173 (1822); Roberts v. Dauphin, &c., Bank, 19 Penn. St., 71 (1852); Cole v. Stewart, 11 Cush., 181 (1853); Butler v. Page, 7 Met., 40 (1843); Winslow v. Merchants Ins. Co., 4 Met., 306 (1842); Pettengill v. Evans, 5 N. H., 54 (1829), doors, locks, etc. See *ante*, chap. 1, p. *47, Severance, as to the effect of severance in cases where the mortgage is considered a mere lien, and not a conveyance.

[The mortgagee's claim is superior to that of a grantee of the land. Briggs v. Chicago, &c., R. Co., 56 Kan., 526, 531 (1896); Payne v. Anderson, 35 La. Ann., 977, 979 (1883); or to that of a subsequent mortgagee of the fixtures. Jackson *ads.* Turrell, 39 N. J. Law, 329, 331 (1877); Best v. Hardy, 123 N. C., 226 (1898); see, also, Howell v. Barnard, 32 Ill. App., 120 (1889); or to that of an assignee. Farmers & Mechanics' Bank of Georgetown v. Cover, 1 Hay. & Haz., 177, 178 (D. C., 1844); State Sav. Bank v. Kercheval, 65 Mo., 682, 688 (1877); Annely v. De-Saussure, 12 S. C., 488 (1879). See, generally, Thompson v. White Water Val. R. R. Co., 132 U. S., 68 (1889); Wight v. Gray, 73 Me., 297 (1882); Tarbell v. Page, 155 Mass., 256 (1892); Meagher v. Hayes, 152 Mass., 228 (1890); Bean v. Brackett, 34 N. H., 102, 118 (1856); Wharton v. Moore, 84 N. C., 479 (1881); Miles v. Ankatell, 25 Ont. App., 458, 461 (1898).]

If fixtures in a mill erected upon real estate on which there were at the time of such erection two mortgages, be sold on execution by the junior mortgagee, and purchased and removed from the mill by him, and he subsequently rents the mill to a third party, who hires the fixtures of the plaintiff with the understanding that he is to place them back in the mill for use, giving his bond for their return, the fixtures thereby become subject to the senior mortgage, and pass by a foreclosure and sale thereunder to the purchaser; the right of the junior mortgagee, who was made a party to such foreclosure, is thereby extinguished, and the party hiring the fixtures is excused from returning them, and is not liable on his bond for their non-return. Daniels v. Bowe, 25 Iowa, 403 (1868). So *held*, without considering what rights the plaintiffs acquired by their purchase of the fixtures under the execution at law. [A purchaser at a mortgage sale under a second mortgage, the prior mortgage having been recorded, can

is considered as looking to the redemption of the property, and what he adds to it of a permanent character is for his own benefit. However expensive the erections, he may always save himself from loss by paying the debt and redeeming the premises.[2]

The authorities also generally lay down the rule, that inasmuch as the mortgagor cannot confer a greater right upon another than he possesses himself, fixtures annexed by a tenant of the mortgagor under a lease executed subsequent to the execution of the mortgage, pass on a foreclosure sale to the purchaser at such sale, and cannot be removed by such tenant.[3]

not claim for improvements made by him. Asher v. Mitchell, 9 Ill. App., 335, 337 (1881). Where a first mortgage is foreclosed without making a second mortgagee a party, and a purchaser at the foreclosure sale makes improvements, they are covered by the second mortgage. Catterlin v. Armstrong, 101 Ind., 258, 266 (1884); 79 Ind., 514, 521 (1881).]

[Where a grantee of land has constructive notice of a mortgage thereon, the mere fact that the mortgagee knows that the former is making improvements will not estop him from claiming the benefit thereof. Catterlin v. Armstrong, 101 Ind., 258, 267 (1884); Mayo v. Cartwright, 30 Ark., 407, 412 (1875).]

[If the mortgagor has sold the fixtures, after a sale of the land pursuant to the terms of the trust deed, a trust attaches to the funds for the benefit of the grantee of the land. Davis v. Mugan, 56 Mo. App., 311, 320 (1893).]

[The consent of the mortgagee to the removal of fixtures may be implied; and a general custom would show an intent not to make a shingle-mill a part of the realty. Choate v. Kimball, 56 Ark., 55, 62 (1892).]

[2] Corliss v. McLagin, 29 Me., 115 (1848). [Wight v. Gray, 73 Me., 297, 298 (1882); Chase v. Wingate, 68 Me., 204, 206 (1878); Haven v. Adams, 90 Mass., 363 (1864); Foote v. Gooch, 96 N. C., 265, 270 (1887); Monti v. Barnes [1901], 1 K. B., 205, 208.]

[3] Gardner v. Finley, 19 Barb., 317 (1855); Frankland v. Moulton, 5 Wis., 1 (1856); Preston v. Briggs, 16 Vt., 124 (1844), where, however, the annexation was made after the law day and pending suit to foreclose; Lynde v. Rowe, 12 Allen, 100 (1866). [Thompson v. Vinton, 121 Mass., 139, 143 (1876); Union Ins. Co. v. Tillery, 152 Mo., 421, 425 (1899); Burkhardt v. Hopple, 6 Ohio Dec., 127 (1897); London Loan Co. v. Pulford, 8 Ont. Pr., 150, 153 (1879).]

As to whether this doctrine applies to trade fixtures a *quaere* is suggested in Cowden v. St. John, 16 Iowa, 590 (1864); but no case has been found supporting this distinction. [Where a son, paying no rent, was a tenant at will of his father, and the latter mortgaged the land, after which the son placed a steam engine thereon, *held*, that it was covered by

the mortgage. Anderson v. McEwen, 9 Up. Can. C. P., 176, 179; but in Pratt v. Keith, 5 Montg. Co. (Pa.), 113 (1889), opera chairs were held to be trade fixtures and not passing under a prior mortgage of the land as against an execution creditor of the tenant. In Broaddus v. Smith, 121 Ala, 335, 339 (1898), it was held that a tenant may remove fixtures subsequently annexed if the mortgagee's security is not impaired; and in Pioneer Co. v. Fuller, 57 Minn., 60, 63 (1894), it was held that a tenant who has placed fixtures in a house after a mortgage thereon, has the same right to remove them against a purchaser upon foreclosure as he would have had against his lessor. This is true even though the right of removal arises out of a special agreement with the mortgagor. Belvin v. Raleigh Paper Co., 123 N. C., 138, 144 (1898). Trade fixtures placed upon the premises by a tenant of the mortgagor subsequent to the mortgage, are removable as against the mortgagee, although such tenant shortly afterwards has acquired an undivided part of the equity of redemption. Sanders v. Davis (1885), 15 Q. B. D., 218. In Jones v. Detroit Chair Co., 38 Mich., 92, 93 (1878), it is said that the lessee's rights to machinery are not affected; but if they purchase the property, they unite the title to the realty and fixtures, so that the fixtures become subject to the mortgage. A mortgagee of trade fixtures has a reasonable time to remove the same after a foreclosure sale of the land. Bernheimer v. Adams, 70 App. Div., 114, 119 (N. Y., 1902), aff'd 175 N. Y., 472 (1903). A feed-wire placed upon the poles by a lessee of an electric railway, for its own accommodation, is not covered by a prior mortgage of the railway. Kansas Trust Co. v. Electric Power Co., 116 Fed., 904 (U. S. C. C., Mo., 1902).]

See, also, *Ex parte* Cotton, 2 Mont. Dea. & DeG., 725 (1842); Cullwick v. Swindell, L. R., 3 Eq., 249 (1866), where fixtures erected by a firm upon land owned by one of the partners were considered as bound by a prior mortgage upon the land; also *Ex parte* Searth, 1 Mont. Dea. & DeG., 240 (1840); Trappes v. Harter, 3 Tyrwh., 603 (1833); s. c., 2 Cr. & M., 153; 3 L. J. (N. S.), Exch., 24 (cited *ante*, p. *276, in this chapter); Christian v. Dripps, *ante*, p. *273. [See Coleman v. Stearns Mfg. Co., 38 Mich., 30, 37 (1878). Articles annexed by one partner to the land of the other which is mortgaged, must be considered as annexed by the mortgagor; and an agreement to treat them as personalty can not bind the mortgagee. Thompson v. Vinton, 121 Mass., 139, 142 (1876). In Penn v. Citizens' Bank, 32 La. Ann., 195, 200 (1880), a boiler, capable of removal, was held to belong to a partnership as against a mortgagee of the realty. See, also, Gooderham v. Denholm, 18 Up. Can. Q. B., 203, 211 (1859).]

[Fixtures placed upon mortgaged land by a licensee of the mortgagor are covered by the mortgage. Ekstrom v. Hall, 90 Me., 186, 190 (1897); Wight v. Gray, 73 Me., 297, 299 (1882). In the latter case a frame building resting upon posts set in the ground, and having a chimney, erected by the husband of the mortgagor and with her consent was held to be covered by the mortgage.]

[A mortgage of a railroad does not cover a telegraph line afterwards

Of late years there has appeared a tendency, which in some States has become an established rule, that, while improve- [*283] *ments made by the mortgagor on the mortgaged premises will be presumed to have been made for the benefit of the inheritance, yet this presumption will not be taken to be an absolute one, either against the mortgagor or the owner of chattels placing them upon the mortgaged premises under an agreement that they shall continue to remain personalty; and where the intention of the party making the annexation is that the thing annexed shall not by annexation become part of the freehold, the absence of a concurrent intent on the part of a prior mortgagee of the real estate will not, it is held, avail to make such annexed chattels realty. [1]Although it may with

built upon the right of way, and which belongs to another corporation. Western Union Tel. Co. v. Burlington & Southwestern R'y Co., 3 McCrary, 130 (U. S. C. C., Iowa, 1882).]

[1] See Tifft v. Horton, 53 N. Y., 380 (1873); Crippen v. Morrison, 13 Mich., 35 (1864), per Campbell, J., where it is suggested that the statutes forbidding possessory actions against the mortgagor have changed his position as to this question; Eaves v. Estis, 10 Kan., 314 (1872); see, also, Yater v. Mullen, 23 Ind., 562 (1864); s. c., 24 id., 277, a judgment lien. [Mott Iron Works v. Middle States Co., 17 App., D. C., 584 (1901); Vanderslice v. Knapp, 20 Kan., 647, 649 (1878); Walburn-Swenson Co. v. Darrell, 49 La. Ann., 1044, 1045 (1897); New York Investment Co. v. Cosgrove, 47 App. Div., 35, 37 (1900), aff'd 167 N. Y., 601 (1901); Sprague Nat. Bank v. Erie R. R. Co., 22 App. Div., 526, 529 (N. Y., 1897); Nichols v. Potts, 71 N. Y. Supp., 765, 766 (1901); Brand v. McMahon, 15 N. Y. Supp., 39 (1891); Farnsworth v. Western Union Co., 6 N. Y. Supp., 735, 743 (1889); see, also, Miller v. Waddingham, 91 Cal., 377, 381 (1891); Harris v. Hackley, 127 Mich., 46, 50 (1901); Northwestern Ins. Co. v. George, 77 Minn., 319 (1899); Merchants' Nat. Bank v. Stanton, 59 Minn., 532 (1894); Mundine v. Pauls, 28 Tex. Civ. App., 46 (1902); First Nat. Bank of Braddock v. Hyer, 46 W. Va., 13, 16 (1899).]

[Where a husband, in fraud of his creditors, places improvements upon his wife's mortgaged land, the claim of the creditors to such improvements is superior to that of the mortgagee. Ware v. Hamilton Brown Co., 92 Ala., 145, 151 (1890).]

[Where one tenant in common mortgages his undivided share, and the other makes improvements, the general rule that subsequent improvements inure to the mortgagee gives way to the rule which governs in cases of partition. Annely v. DeSaussure, 17 S. C., 389, 394 (1881).]

[Where the mortgagor conveys a right of way to a railroad company, over which it lays its tracks, such track does not pass under foreclosure of

the mortgage. Skinner v. Ft. Wayne, T. H. & S. W. R. R. Co., 99 Fed., 465 (U. S. C. C., Ind., 1900).]

[Where a suit to foreclose a vendor's lien is instituted, and certain defendants claim, in their answer, a house upon the land as their chattel, and where, if no defense were made, the plaintiff would have included the house in the sale of the realty, a demurrer by the plaintiff that the title to personal property can not be litigated in such an action, is properly overruled. McDonald v. Shepard, 25 Kan., 112, 116 (1881).]

[See Suc. of Bienvenu, 106 La., 595 (1902), as between two mortgagees.]

Where H. contracted with S. to put boilers in his mill in place of worn out old ones, to be paid $4 per month for their use, and to have the right to remove them whenever he pleased, and they could be removed without other injury than taking down the boiler-wall built of brick and standing under a shed outside of the mill. *Held*, that this was a hiring of chattels, that they did not become subject to a prior mortgage on the land, and hence did not pass by a sale of the land on execution issued on a judgment thereon. Hill v. Sewald, 53 Penn. St., 271 (1866). See, however, Fryatt v. Sullivan Co., 5 Hill, 116 (1843); s. c., 7 Hill, 529.

[A cotton press placed, for temporary exhibition by a third party, in a mill, is not covered by the mortgage of the mill and "all other machinery and improvements that may be hereafter placed therein or attached thereto;" nor does it come within the mortgage if one of the mortgagors afterwards purchases it, if it was not to be used upon the premises, but remained solely as a place of safe-keeping. Stell v. Paschal, 41 Tex., 640, 646 (1874).]

In Vermont a distinction is justly made between machinery placed in the mill before and that annexed after the execution of the mortgage upon the land, and it is *held* that as to machinery which was in the yard but had not been placed in the mill at the time of the execution of the mortgage upon the land, but was annexed afterwards, as to which the mortgagee of the land was not misled, and advanced nothing on the faith of it, the right of the conditional vendor of such machinery is paramount to that of the mortgagee of the land. Davenport v. Shants, 43 Vt., 546 (1871). See, however, Frankland v. Moulton, 5 Wis., 1 (1856).

[A water-wheel substituted for an old one does not pass under a prior mortgage of a sawmill as against a seller on condition. Page v. Edwards, 64 Vt., 124, 131 (1891).]

[Clearer evidence, as between mortgagor and mortgagee, is required to make articles a part of the freehold when attached after the execution of the mortgage, than if attached before, upon the idea that the agreement was made with reference to the existing condition of the property as security. Clore v. Lambert, 78 Ky., 224, 227 (1879).]

In discussing the point stated in the text, Folger, J., in Tifft v. Horton, said: "It may in this case be conceded that if there were no fact in it but the placing upon the premises of the engine and boilers in the manner in which they were attached thereto, they would have become fix-

tures, and would pass as a part of the realty. But the agreement of the then owner of the land and the plaintiff is express, that they should be and remain personal property until the notes given therefor were paid; and, by the same agreement, power was given to the plaintiffs, to enter upon the premises in certain contingencies, and to take and carry them away. While there is no doubt but that the intention of the owner of the land, was that the engine and boilers should ultimately become a part of the realty, and be permanently affixed to it, this was subordinate to the prior intention expressed by the agreement. That fully shows her intention and the intention of the plaintiffs, that the act of annexing them to the freehold should not change or take away the character of them as chattels, until the price of them had been fully paid. And as the parties may by their agreement, expressing their intention so to do, preserve and continue the character of the chattels as personal property, there can be no doubt but that as between themselves the agreement in this case was fully sufficient to that end. But it is contended, that where in the solution of this question the intention is a criterion, it must be the intention of all those who are interested in the lands; and, that here the defndants, prior mortgagees of the real estate, were interested, and have not expressed nor shown such intention. It is not to be denied, that as a general rule, all fixtures put upon the land by the owners thereof, whether before or after the execution of a mortgage upon it, become subject to the lien thereof. Yet, I do not think that the prior mortgagee of the realty can interpose before foreclosure and sale, to prevent the carrying out of such an agreement as that in this case. Had the mortgagees taken their mortgage upon the lands, after the boilers and engine had been placed thereon under this agreement, they would have had no right to prevent the removal of them by the plaintiffs, on the happening of the contingencies contemplated by it. The rights of a subsequent mortgagee are no greater than those of a subsequent grantee, and he, it is *held,* cannot claim the chattels thus annexed, and must seek his remedy for their removal by virtue of such agreement upon the covenants in his conveyance of the lands. (Mott v. Palmer, 1 N. Y., 564; and see Ford v. Cobb, 20 N. Y., 344.) A prior mortgagee, who certainly has not been induced to enter into his relation to the lands by the presence thereon of the chattels in dispute subsequently annexed thereto, has no greater right than a subsequent mortgagee. Neither could claim as subject to the lien of his mortgage, personal property brought on to the premises with permission of the owner of the lands, and not at all affixed thereto. Nor can either claim personal property as so subject, from the mere fact of the affixing, where, by the express agreement of the owner of the fee and the owner of the chattel, its character as personal property was not to be changed, but was to continue, and it to be subject to a right of removal by the owner of the chattel on failure of performance of conditions. The language of the authorities is, that the chattel in such case is personal property, for which an action of trover for the conversion of it may be maintained. (Smith v. Benson, 1 Hill, 176; Mott v. Palmer, *supra;* Farrar v. Chauffetete, 5 Den., 527; Ford v. Cobb, *supra.*)'' [See Warren v. Liddell, 110 Ala., 232 (1895); Ellison

v. Salem Mining Co., 43 Ill. App., 120, 127 (1889); Pope v. Jackson, 65 Me., 162, 165 (1876); Defiance Mach. Works v. Trisler, 21 Mo. App., 69 (1886); Cochran v. Flint, 57 N. H., 514, 546 (1877); General Electric Co. v. Transit Co., 57 N. J. Eq., 460, 471 (1898); Duntz v. Granger Brew. Co., 83 N. Y. Supp., 957, 959 (1903); Farnsworth v. Western U. T. Co., 3 Silvernail, 30 (Supr. Ct., N. Y., 1889); Hine v. Morris, 3 Wkly. Cin. Law. Bul., 515 (Dist., 1878); Padgett v. Cleveland, 33 S. C., 339, 346 (1889); Thomas v. Inglis, 7 Ont., 588 (1885); Watrous Engine Co. v. Henry, 2 Man., 169 (1884); see, also, Banque d'Hochelaga v. Watrous Engine Co., 27 Can., 406 (1897), aff'g Watrous Engine Co. v. Hochelaga Bank, 5 Que., Q. B., 125 (1896); Chevalier v. Beauchemin, 17 Rev. Leg., 642 (Que., C. S., 1889); Condit v. Goodwin, 89 N. Y. Supp., 827.]

[See Western Union Tel. Co. v. Burlington & S. W. Co., 11 Fed., 1 (U. S. C. C., Iowa, 1882), as to a telegraph line upon foreclosure sale of a railroad right of way.]

[A steam-train, consisting of copper-piping and copper pans, placed in a sugar house by the mortgagor, and necessary to its operation (it not appearing that it was not of the character of fixtures which a lessee would have the right to remove, or that its removal would impair the security) is not covered by the mortgage as against one claiming a lien for unpaid purchase money. To hold otherwise would be inequitable, and in restraint of trade. Phelps v. Edwards, 52 Tex., 371 (1880).]

[The rule that all fixtures annexed, subsequent to the execution of the mortgage, by the tenant or licensee, became, as to the mortgagee, a part of the realty, was founded upon the old common law doctrine that the mortgage was a conveyance, and the mortgagor a tenant at will; but in states where a mortgage is mere security, there is a tendency to repudiate the old rule, and to hold that where the intention of the mortgagor and of the party making the annexation was that the thing annexed should not become a part of the realty, the absence of agreement to that effect on the part of the prior mortgagee will not, of itself, make the annexation a part of the security. The annexation not having been made when he took his mortgage, he has not been misled nor advanced anything on the faith of it. Merchants' Bank v. Stanton, 55 Minn., 211, 220 (1893).]

[Where a mortgagor has no right nor power to make an article a part of the realty, he can not do so as against the owner of the article. General Electric Co. v. Transit Co., 57 N. J. Eq., 460, 472 (1898).]

[Telegraph wires strung under an agreement with a third party for their removal, and which can be removed without material injury to the structure, do not lose their character as personalty, and are removable. Boston Trust Co. v. Bankers' Tel. Co., 36 Fed., 288, 297 (U. S. C. C., N. Y., 1888).]

[Where the agreement, reserving title in the seller, was made in New Hampshire, the law in that state will govern. Hence, a water-wheel is not covered by a prior mortgage. The burden is upon the one claiming that it is covered by the mortgage, to show that the mortgage was subsequent to the annexation. Buzzell v. Cummings, 61 Vt., 213 (1888).]

[In Wight v. Gray, 73 Me., 297, 298 (1882), it is said that the distinction made in Tifft v. Horton is of no importance when the mortgagee is in possession after foreclosure.]

But where the articles in question (a steam-engine and boiler bolted to permanent and substantial foundations, shafting and gearing fitted, adapted and firmly fastened to the building where used and of no use elsewhere except as old material) are actually and firmly annexed to the freehold in as permanent and substantial a manner as is usual, and as is adapted to the nature and objects of their employment, though capable of being removed without injury to the building, there being no special intent on the part of the owner of the fee as to making them a part of the freehold, and no intention as to removing them at any future time, such facts furnish sufficient evidence of an intention to make such articles a permanent accession to the freehold; and the execution of a chattel mortgage upon the articles in question before being placed in the mill is not sufficient to overthrow this presumption and raise the contrary one of an intention to preserve their character as personalty. Voorhees v. McGinnis, 48 N. Y., 278 (1872). See, also, Frankland v. Moulton, 5 Wis., 1 (1856); Pierce v. George, 108 Mass., 78 (1871). [Cooper v. Harvey, 16 N. Y. Supp., 660, 663 (1891); Henry v. Von Brandenstein, 12 Daly, 480 (N. Y. C. P., 1884).]

See, however, *dictum* in Perkins v. Swank, 43 Miss., 363 (1870); Tibbetts v. Moore, 23 Cal., 208 (1863).

But a planing-machine, fire-pump, saw-benches and saws, worked by hand, being complete in themselves as machines, as were also the copper pipes for steaming hubs, all being of equal use and value wherever wanted, affixed to the building only for convenience in using, and capable of removal without injury to the building or to themselves, were *held* to be chattels and to pass under the chattel mortgages. Voorhees v. McGinnis (*supra*). As to the articles last named the principle applied seems to have been that the manner of the attachment being such as to leave the mind in doubt as to whether they became a part of the freehold or not, the intention of the parties, as evinced by the chattel mortgage was allowed a controlling force. See, also, Eaves v. Estis (*supra*). [Pomeroy v. Schwender, 2 Kan. App., 305, 306 (1896); see, also, Kinsey v. Bailey, 16 Supr. Ct. (9 Hun), 452 (N. Y., 1876).]

[That a party had no intention to remove machines until there was danger of losing the land does not affect his rights if the annexation was not permanent. Kendall v. Hathaway, 67 Vt., 122, 127 (1894).]

[Where a chattel mortgage is taken by the sellers of machinery to be placed in a flouring-mill, and which is connected with the main frame in the building in but one place, where a box is bolted to one of the timbers for the shafting to run in, and which can be removed without material injury to the building, the chattel mortgage will take precedence over a prior mortgage of the land. First Nat. Bank v. Elmore, 52 Iowa, 541, 552 (1879).]

[In Ferris v. Quimby, 41 Mich., 202, 206 (1879), it was held that the

mortgagors never intended to make machinery a part of the realty, and no one could be wronged by keeping it separate. The mortgagee was not deceived, as the machinery was not in the building at the time the mortgage was executed. As the amount of the mortgage proved to be all the land was worth, it was not unlikely that the owners of the equity of redemption would have declined to place valuable machinery in the building had they supposed the mortgage would cover it.]

[A hay-scale easily removed from a pit dug and walled for it, is not covered by a prior mortgage of the land as against an unpaid seller. Garven v. Hogue, 14 Wkly. Cin. Law Bul., 175 (C. C., 1885).]

[A vendor's lien embraces permanent improvements subsequently made; and may be extended to embrace chattels affixed with the intention to make them permanent, but not as against a creditor of the purchaser without notice where they can be removed without diminishing the security. The burden is upon the lien-holder to show that machinery subsequently annexed is covered by his lien. Clore v. Lambert, 78 Ky., 224, 231 (1879). A vendor's lien does not cover a gin-stand, a grist-mill stand and an iron-screw cotton press, that can be detached without injury to the freehold. McJunkin v. Dupree, 44 Tex., 500 (1876). [See Miller v. Wilson, 71 Iowa, 610 (1887).]

[Where a lien was reserved upon the conveyance of a swing ferry-boat buoys, chain, machinery, the franchise, and an easement in the banks of an island to fasten the chain which was connected with the boat, such lien does not attach to a new boat, buoys and part of a chain replacing the former when worn out, as they are not fixtures. Cowart v. Cowart, 71 Tenn., 57 (1879).]

In Tibbetts v. Moore, above cited, a conclusion was reached with reference to the engine and boiler in question contrary to that above stated in Voorhees v. McGinnis, and the lien of the chattel mortgage executed before the annexation was made was considered prior to that of the mortgage upon the real estate, the lien of which though prior in date to the chattel mortgage upon the engine, etc., was considered to attach upon the engine, etc., only from the time they became attached to the realty.

[Mortgaged machinery was placed in a flouring mill upon which there was a mortgage. *Held*, that if the machinery could be removed without injuring the real estate, the chattel mortgage was effectual thereon. If the detachment would occasion some diminution in the value of the realty, the depreciation must be made whole. This rule is in the interest of trade. "That the realty mortgagee's security is kept whole is all that he can ask, as against the property of third parties. When the mortgaged personal property is attached, the mortgagor has only an equity of redemption therein, to which the mortgage on the realty at once attaches." The mill and machinery should be offered for sale separately and together, and sold in the way in which they would bring the larger sum. If together they bring a larger sum than when offered separately, the difference between the two sums will show the amount to which the realty would be damaged, while the personal mortgagee would be only entitled to what the

[*284] *some force be urged in support of the reasonableness of this doctrine that, the property not being annexed to the land at the time of the execution of the mortgage, the mortgagee of the land was not misled and has advanced nothing on the faith of [*285] *it, and hence ought not to avail himself of it as a part of his security, it not having been intended as such by the party making the annexation, still the rule itself has so far not been [*286] *generally adopted.[1] If the mortgagee has consented to the arrangement by which the article is to be considered personalty, though annexed to the land, the case is different, and the right of removal is not lost.[2] And in cases between third

personal property would bring if sold separately. Hurxthal v. Hurxthal, 45 W. Va., 584 (1898). To similar effect, see Miller v. Griffin, 102 Ala., 610, 615 (1893); Anderson v. Creamery Mfg. Co., 67 Pac., 493 (Ida., 1902); Binkley v. Forkner, 117 Ind., 176 (1888); Carpenter v. Allen, 150 Mass., 281, 282 (1889); Campbell v. Roddy, 44 N. J. Eq., 244 (1888); Waller v. Bowling, 108 N. C., 289, 296 (1891); Henkle v. Dillon, 15 Ore., 610, 616 (1888). Where opera-chairs are sold under an agreement that a chattel mortgage shall be given to secure part of the purchase price, which is done, and the buyer agrees to insure them for the seller, an intention is shown by the buyer that they shall remain personal property; nor are the rights of the seller, as against a mortgagee of the building affected by taking a new chattel mortgage at the expiration of the first. Andrews v. Chandler, 27 Ill. App., 103, 110 (1887).]

[1] See Hunt v. Bay State Iron Co., 97 Mass., 279 (1867); Richardson v. Copeland, 6 Gray, 536 (1856); Clary v. Owen, 15 Gray, 522 (1860); Pierce v. Emery, 32 N. H., 484 (1856). [Paine v. McDowell, 71 Vt., 28, 33 (1898); see, also, Gough v. Wood [1894], 1 Q. B., 713, 720.]

In Richardson v. Copeland, the property (a steam-engine and boiler) having been permanently erected on the premises of the owner in fee, was considered *de facto* a part of the realty, and the agreement with the builders to give a mortgage thereon as personalty, as against all taking title to the estate in fee, was considered inoperative and void, notwithstanding there was a general usage and custom between manufacturers and vendees of such property to treat it in all respects as personal property.

[2] See the cases cited in note next *supra;* also Bartholomew v. Hamilton, 105 Mass., 239 (1870). [See Wallace v. Dodd, 136 Cal., 210 (1902); Watertown Steam Engine Co. v. Davis, 5 Houston, 192, 212 (Del., 1877); Brooks v. Prescott, 114 Mass., 392 (1874).]

So, if he treats it as personal property and consents to its removal. Bartholomew v. Hamilton (*supra*). See, also, Yater v. Mullen, 23 Ind., 562 (1864); s. c., 24 Ind., 277; Sheldon v. Edwards, 35 N. Y., 279 (1866).

[Where machinery covered by a recorded chattel mortgage is placed by the mortgagor upon land covered by a mortgage, the mortgagee of the

parties, or to which the mortgagee is not a party and in which his rights would not be affected, agreements to consider an annexation to the mortgaged premises as the personal property of the party annexing it, will be enforced.[3]

land is not entitled to such machinery as against the chattel mortgagee; and especially is this so if the mortgagee of the land had actual notice of the facts at the time the mortgage is given and admitted the priority of the lien of the chattel mortgage. In such case the mortgagee of the land is a party to the wrongful conversion of the personal property into realty, and can not have the benefit of his own wrong. Rowland v. West, 69 Supr. Ct. (62 Hun), 583 (N. Y., 1892).]

[Where the mortgagee of land consents to the seller of machinery reserving title thereto, the seller is authorized to assume that the consent covers gearing and attachments, and additional machines where it is for the obvious interest of such mortgagee; and this is confirmed by the subsequent discussions between the parties wherein no distinction is made between the machines first set up and those furnished later. Hawkins v. Hersey, 86 Me., 394 (1894). See Paine v. McDowell, 71 Vt., 28 (1898), that consent of the mortgagee to the removal of articles, annexed by a tenant, will be implied from allowing the mortgagor to remain in possession, and deal with the property without objection.]

[Where a real estate mortgage contains a clause which says that it is given subject to a chattel mortgage on machinery, the mortgagee will be estopped although the chattel mortgage is given and the machinery annexed subsequently. Ellison v. Salem Mining Co., 43 Ill. App., 120, 127 (1889). See Scarth v. Ontario Power Co., 24 Ont., 446 (1894), where the mortgage expressly excepts machinery and trade fixtures of tenants.]

[Where a statute provides that a school district can not build a frame school-house "on any site for which they have not a title in fee, without the privilege to remove the same," the lien of a mortgage upon the land can not attach to a school-house thereon; and a decree in foreclosure that the interest of the school district in the real estate is inferior to the lien of the mortgage, is not an adjudication that such school-house is real estate. Burns v. School District, 61 Neb., 351, 353 (1901).]

[Where the mortgage is of a leasehold, and the mortgagor is a nurseryman, consent of the mortgagee to remove fixtures necessary, usual and proper to carry on the business will be implied; otherwise persons dealing with the mortgagor will be exposed to very unreasonable risks, and business would be seriously impeded. Gough v. Wood [1894], 1 Q. B., 713.]

[3] Jewett v. Patridge, 12 Me., 243 (1835). In this case, A., by consent of B., the mortgagor in possession, built a house on the mortgaged premises, which was subsequently taken and sold on execution as the property of A. *Held*, in an action of trover by the purchaser at the execution sale against C., in possession under a purchase from B., who had taken a fraudulent bill of sale from A., C. having notice of the fraud, that C. could not resist the

[*287] *With reference to the case of a mortgagee in possession, the rule is that where he undertakes without the consent and approbation of the mortgagor to make improvements on the property, though they may be of a beneficial and permanent character, he does it at his peril, and has no right to look for an allowance at the hands of the mortgagor.[4] It has, however, been held that a mortgagee after a recovery on a bill to redeem from the mortgage, but before a writ of possession was issued thereon, might lawfully take down and remove any buildings erected by him with his own materials, which were not properly fixtures, or so connected with the soil as that they could not be removed without prejudice to it, the same rule being applied, apparently, as in the relation of landlord and tenant.[5]

plaintiff's claim by showing that the mortgagee had always claimed the house and forbade its removal. As between A. and B., the house was the personal property of A., and the mortgagee not being a party to the suit, his rights would not be in any way affected by this action. [Schumacher v. Edward P. Allis Co., 70 Ill. App., 556 (1896); see, also, Gordon v. Miller, 28 Ind. App., 612, 615 (1901).]

Where a tenant for years of a town lot, under a provision in the lease that he may remove all buildings at the end of his term, erects a building thereon resting on posts set in the ground, upon which he makes a chattel mortgage describing it as "goods and chattels," all persons claiming under him will be estopped from denying that such building is personal property as against persons claiming under such mortgage. Ballou v. Jones, 37 Ill., 95 (1865). [See, *post*, p. *346.]

[4] Clark v. Smith, 1 N. J. Eq., 121, 138 (1830); Dougherty v. McCalgan, 6 Gill. & J., 275 (1834). [McQueen v. Whetstone, 127 Ala., 417, 432 (1900); McCumber v. Gilman, 15 Ill., 381 (1854); Coleman v. Witherspoon, 76 Ind., 285, 290 (1881); Horn v. Ind. Nat. Bank, 125 Ind., 381, 385 (1890); Cook v. Ottawa Univ., 14 Kan., 548, 552 (1875); Bradley v. Merrill, 91 Me., 340, 345 (1898); Madison Ave. Church v. Baptist Church, 41 N. Y. Super., 369, 417 (1876); Sanders v. Wilson, 34 Vt., 318, 321 (1861); Witt v. Trustees of Druids, 55 Wis., 376, 380 (1882); see, also, Bateman v. Raymond, 15 Mont., 439, 444 (1895); Dewey v. Brownell, 54 Vt., 441 (1882).]

[5] Taylor v. Townsend, 8 Mass., 411 (1812). The erections in question in this case were a barn resting on posts, and a shed used as a blacksmith shop, there being no cellar under either of them. Parker, J., in delivering the opinion of the court, said: "However rigidly the rights of landlords against their tenants may have been construed in ancient times, it is now settled, that in favor of trade, manufactures and business, buildings erected for those objects may be carried away by those whose estate is determined [Bull. N. P., 34]; and Lord Mansfield, in the case of Lawton

With reference to liens upon land, created by statute, as *in the case of deeds of conveyance, their effect upon the [*288] right to fixtures, is often a matter of construction depending upon the intention of the legislature. Under statutes making a judgment against the owner of the inheritance a lien upon land, the term "land" has a very extensive and comprehensive signification, and the lien as against the owner of the land, it seems, extends to all those things which would pass by a sale thereof on execution.[1]

v. Salmon [1 H. Bl., 259, in notes], adopts the common-sense doctrine, that improvements made by the tenant during his term may be removed by him, if he does not thereby prejudice the estate of his landlord. It is enough for the tenant to say, 'I leave you the land as I found it.' If this doctrine is advanced in the case of a tenant, who either knows the duration of his own term, or, if a tenant at will, who can abandon the soil when he chooses, and therefore may be said to incur expense by erecting buildings, etc., in his own wrong, *a fortiori*, it ought to apply to one who has held the estate for many years under a conveyance from the owner, without any expectation that his estate would be defeated by the performance of a condition attached to it; which was the case of the present defendant. On the first count, therefore, we decide that the defendant is not liable."

D. purchased a lot of land at a sheriff's sale on execution, entered into possession and erected buildings thereon. Afterwards he removed the buildings, and on the same day that the buildings were removed, the defendants in execution sold the premises to T., who a day or two afterwards redeemed the lot from the sale and then brought suit against D., to recover the value of the buildings; and it not appearing that the buildings were ever annexed to the soil, and they appearing to have been mere temporary structures and removed before D.'s possession terminated. *Held*, that the plaintiff could not recover. Tyler v. Decker, 10 Cal., 435 (1858). [See Kinney v. Knoebel, 51 Ill., 112, 126 (1868); Marshall v. Stewart, 80 Ind., 189, 195 (1881).]

[If a mortgagor does not encourage the purchasers of a lot under a decree of sale foreclosing a mechanics' lien, to place improvements thereon, or hold out inducements that he would abandon all claim if improvements were made, and such purchasers know that the mortgagee has a right to take out a writ of error, the mortgagee is not estopped from claiming the benefit of improvements, upon having the decree of sale reversed. Powell v. Rogers, 11 Ill. App., 98, 102 (1882).]

[See, upon the point stated in the text, Poole v. Johnson, 62 Iowa, 611, 613 (1883); Cooke v. Cooper, 18 Ore., 142, 149 (1889).]

1 See Coombs v. Jordan, 3 Bland Ch., 311 (1831). See, also, Heaton v. Findlay, 12 Penn. St., 304 (1849); Goff v. O'Conner, 16 Ill., 421 (1855); Latham v. Blakely, 70 N. C., 368 (1874); *ante*, p. *276, in this chapter; also *ante*, p. *47, Severance. [McKinley v. Smith, 29 Ill. App., 106 (1888);

But things which, though attached to the realty, may be removed by a tenant (*e. g.* trade and ornamental fixtures and the like), are regarded as personal chattels in favor of the creditors of the tenant, and therefore are not affected to the prejudice of

Childs v. Hurd, 32 W. Va., 66, 115 (1889); see, also, Rounsaville v. Hazen, 39 Kan., 610 (1888); Kendall Mfg. Co. v. Rundle, 78 Wis., 150 (1890).]

[It makes no difference that the improvements have been made after the lien attached to the land. Taylor v. Morgan, 86 Ind., 295, 298 (1882); Ritter v. Cost, 99 Ind., 80, 87 (1884); Becker v. Witmer, 1 Pearson, 524 (Pa., 1862); Flanary v. Kane, 46 S. E., 312, 315 (Va., 1904).]

[Improvements made by a railroad company are no exception to the rule. Fulkerson v. Taylor, 46 S. E., 309 (Va., 1904).]

[The rule is the same as against a grantee of the land. Lessert v. Sieberling, 59 Neb., 309 (1899); nor can a grantee free the land and improvements from the liens by simply paying upon the judgments the value of the land without the improvements, although he had no actual notice of the lien at the time he made the improvements. The doctrine that the purchaser at an execution sale takes only the judgment debtor's title has no application. Taylor v. Morgan, 86 Ind., 295 (1882). And one purchasing land at a sheriff's sale is entitled to a dwelling-house, stable, cistern and outbuildings thereon as against one claiming to have previously bought them. Pohlman v. DeBouchel, 32 La. Ann., 1158, 1159 (1880).]

[As between a mortgagee of land, a chattel mortgagee of fixtures thereon, and a subsequent judgment creditor, the lien of the real estate mortgage attaches to the land and fixtures; the lien of the chattel mortgage attaches to the fixtures subject to the lien of the real estate mortgage; and the lien of the judgment attaches to the land and fixtures subject to the two prior liens. *Re* Worland, 92 Fed., 893, 895 (U. S. Dist. Ct., Iowa, 1899).]

[Where the owner of land is joint-owner of a saw-mill thereon, the mere fact that a judgment has been obtained which is a naked lien upon the real estate will not change the character of the mill from personal to real property, nor make the owner of the realty own more, and more valuable, property than he would own without those liens. Young v. Baxter, 55 Ind., 188, 192 (1876).]

[A lien for taxes is on a lathe, weighing about three tons, as a part of the realty though not fastened. Green v. Chicago, R. I. & P. R. R. Co., 8 Kan. App., 611, 613 (1899). But where a lien for taxes attached to a mill, which burned down, the lien did not attach to the engine, boiler and machinery severed by the accident. State v. Goodnow, 80 Mo., 271, 275 (1883).]

[Where a collector's bond becomes a statutory lien upon his land, a purchaser of such land, even before default, takes it subject thereto, and it attaches to improvements made by him. Hook v. Richeson, 115 Ill., 431, 449 (1886).]

the tenant or his creditors, by the lien of a judgment against the landlord.[2]

And the rule is possibly the same in both the above respects in the case of a mechanics' lien.[3] Where the law relates only to

[A lien of the unsecured debts of a decedent upon land attaches to fixtures annexed by a devisee of said land. Richmond v. Freemans Nat. Bank, 86 App. Div., 152 (N. Y., 1903).]

[2] See Coombs v. Jordan (*supra*). [See Campbell v. John W. Taylor Co., 62 N. J. Eq., 307, 312 (1901).]

[Where, at a foreclosure sale, certain improvements were reserved, a judgment lien against the purchaser of the land does not attach to the improvements. Dewey v. Walton, 31 Neb., 819 (1891).]

[3] See Gray v. Holdship, 17 S. & R., 413 (1828), where it was *held* that a copper brew-kettle or boiler set up in a brewery passed on a sale to enforce a mechanics' lien. See, also, Morgan v. Arthurs, 3 Watts, 140 (1834), a steam engine; Heaton v. Findlay, 12 Penn. St., 307 (1849). [St. Louis Radiator Co. v. Carroll, 72 Mo. App., 315, 319 (1897); Sosman v. Conlon, 57 Mo. App., 25, 32 (1894); Edwards Co. v. Rank, 57 Neb., 323 (1899); Ward v. Kilpatrick, 85 N. Y., 413, 419 (1881); Second Nat. Bank v. Hatch, 24 Wash., 421 (1901); see, also, Hamilton v. Delhi Min. Co., 118 Cal., 148, 153 (1897); Arnett v. Finney, 29 N. J. Eq., 309, 310 (1878), reversing Case v. Arnett, 26 N. J. Eq., 459.] In the case of the Olympic Theatre, 2 Browne (Pa.), 275 (1813), the permanent stage was considered as a part of the freehold and subject to the lien; but otherwise as to the movable scenery and flying stages. [Where land is subject to a mechanics' lien, such lien attaches to a boiler which is a part of the real estate. Second Nat. Bank v. Hatch, 24 Wash., 421 (1901).]

[For the purpose of the mechanics' lien law, the rules applicable between heir and executor should be applied, and that only should be considered a fixture which is so attached as to become a part of the building which is itself a part of the land. Goodin v. Ellcardsville Hall Ass'n, 5 Mo. App., 289, 294 (1878).]

[Where a mechanics' lien attaches to a building and land, and the building is destroyed by fire, the lien attaches to a building subsequently erected. Cain v. Texas Loan Ass'n, 21 Tex. Civ. App., 61, 66 (1899).]

[The converse of the rule is true—a mechanics' lien upon a building gives a lien upon the interest or estate that the person causing such building to be made thereon has in the land upon which it is situated. Strang v. Pray, 89 Tex., 525, 528 (1896); Roby v. University, 36 Vt., 564, 565 (1864). But this is usually provided for by statute.]

A chattel mortgage upon engines, boilers and saws (property which is "the legitimate subject of fixtures"), which afterwards become, with the knowledge and consent of the mortgagee, firmly annexed to the realty as fixtures in a saw mill, will not be affected by the lien of a mechanic having notice of the facts, for work done by him upon the mill. Sowden v. Craig, 26 Iowa, 156 (1868); and the constructive notice by recording such

the realty, in order to come within the operation of the statute, the structure must be so annexed as to become a part of the [*289] *realty.[1] Thus, according to the better opinion, a float-

chattel mortgage before the annexation of the chattels was, in this case, regarded (Dillon, J., dissenting) as equally effectual for the protection of the mortgagee as actual notice. See *post*.

[A laborers' and materialmen's lien upon a mine does not attach to an engine and machinery which are the property of another, though affixed to the realty, and though the lienors have no notice, as their lien only extends to the owner's interest. Jordan v. Myres, 126 Cal., 565 (1899).]

1 Haeussler v. Missouri Glass Co., 52 Mo., 452 (1873); Graves v. Pierce, 53 Mo., 423 (1873), holding wool-carding machines, etc., braced to keep them steady, not subject to lien. See, also, Gray v. Holdship; Morgan v. Arthurs (cited *supra*); Collins v. Mott, 45 Mo., 100 (1869); Koenig v. Mueller, 39 Id., 165 (1866); Haworth v. Wallace, 14 Penn. St., 118 (1850); Hartman v. Cummings, 43 Penn. St., 322 (1862); Stockwell v. Campbell, 39 Conn., 362 (1872). [Lee v. King, 99 Ala., 246, 249 (1892); Silverton v. Coe Mine Co., 80 Cal., 510, 513 (1889); Michael v. Reeves, 14 Colo. App., 460, 463 (1900); Chapin v. Persse & Brooks Works, 30 Conn., 461, 473 (1862); Schofield v. Stout, 59 Ga., 537 (1877); Hunter v. Blanchard, 18 Ill., 318 (1857); Compound Lumber Co. v. Murphy, 169 Ill., 343, 346 (1897); Hill v. Bowers, 45 Kan., 592, 593 (1891); Consolidated Engineering Co. v. Crowley, 105 La., 615, 635 (1901); Baker v. Fessenden, 71 Me., 292, 293 (1880); Stout v. Sawyer, 37 Mich., 313 (1877); Progress Mach. Co. v. Gratiot Brick Co., 151 Mo., 501 (1899); Deardorff v. Everhartt, 74 Mo., 37, 39 (1881); Schulenberg v. Prairie Inst., 65 Mo., 295, 296 (1877); Simmons v. Carrier, 60 Mo., 581 (1875); John O'Brien Boiler Co. v. Haydock, 59 Mo. App., 653 (1894); Current Riv. Lumb. Co. v. Cravens, 54 Mo. App., 216, 220 (1893); Graton & Knight Co. v. Woodworth-Mason Co., 69 N. H., 177, 178 (1897); Campbell v. John W. Taylor Co., 62 N. J. Eq., 307, 312 (1901); Ward v. Kilpatrick, 85 N. Y., 413, 418 (1881); Jerecke Mfg. Co. v. Struther, 14 Ohio Circ. Ct., 400, 405 (1897); Fitch v. Howitt, 32 Ore., 396, 409 (1898); Murphy v. Fleetford, 30 Tex. Civ. App., 487, 488 (1902); Hinckley Iron Co. v. James, 51 Vt., 240, 245 (1878); Vendome Bath Co. v. Schettler, 2 Wash., 457, 458 (1891); see, also, Fresno Bank v. Husted, 49 Pac., 195 (Cal., 1897); Shakspeare v. Ware, 38 La. Ann., 570, 574 (1886); Shine v. Heimburger, 60 Mo. App., 174, 185 (1894); Buchanan v. Cole, 57 Mo. App., 11 (1894); Meistrell v. Reach, 56 Mo. App., 243 (1893); H. F. Cady Lumber Co. v. Greater Am. Exposition Co., 93 N. W., 961 (Neb., 1903); Jerecki Mfg. Co. v. Struther, 14 Ohio Circ. Ct., 400, 405 (1897).]

[Reservation of ownership by seller does not make the article personal property to the extent of preventing a claim for a mechanics' lien on account of attachment to the freehold. Great West. Mfg. Co. v. Hunter, 15 Neb., 32, 38 (1883); Salt Lake Hardware Co. v. Chainman Mining Co.,

128 Fed., 509, 511 (U. S. C. C., Nev., 1904); Cooper v. Cleghorn, 50 Wis., 113, 121 (1880).]

[Where an article is intended and designed as a fixture, but is not annexed, owing to the neglect of the land-owner, the lien will not be defeated. Spruhen v. Stout, 52 Wis., 517, 525 (1881).]

[Mechanics' lien not allowed for the following articles: drying-machine. Curnew v. Lee, 143 Mass., 105, 108 (1886); machines connected by belting, removable at pleasure. Haslett v. Gillespie, 95 Pa. St., 371, 375 (1880); machinery. Richardson v. Koch, 81 Mo., 264 (1883). A privilege will not be allowed for pieces of machinery for a sugar-house, removable without injury. Scannell v. Beauvais, 38 La. Ann., 217 (1886). Mechanics' lien not allowed for shells for cloth printing machines, as such shells are not a part of the machines, the machines being complete without them, although the bore of the shell must correspond with the diameter of the mandrel of the machine, and the machines are fixed. A pattern is engraved upon the surface of each shell, and there may be any number of such shells used in one machine. Griggs v. Stone, 51 N. J. Law, 549 (1889); lubricating oil. Standard Oil Co. v. Lane, 75 Wis., 636 (1890); tools. May v. McConnell, 102 Ala., 577, 581 (1893).]

[Mechanics' lien allowed for an engine. Hooven v. John Featherstone's Sons, 111 Fed., 81, 94 (U. S. C. C. A., Mo., 1901); an engine for hoisting coal from mines. Dobschuetz v. Holliday, 82 Ill., 371 (1876); but not for a portable engine. Thompson Mfg. Co. v. Smith, 67 N. H., 409, 410 (1892). Lien allowed for a boiler. Kelley v. Border City Mills, 126 Mass., 148, 150 (1879); engines, boilers, pumps, blowers, gearing, belting, emery wheel, melting furnaces, grinding mill, annealing furnaces and smoke stacks. Currier v. Cummings, 40 N. J. Eq., 145, 148 (1885); an engine, gas-compressor and oil-traps, and foundation plates. Watts-Campbell Co. v. Yuengling, 125 N. Y., 1 (1890), aff'g 58 Supr. Ct. (51 Hun), 302 (1889); gin-stands. White v. Chaffin, 32 Ark., 59, 70 (1877); machinery for a saw-mill. Vilas v. McDonough Mfg. Co., 91 Wis., 607, 613 (1895); a brick-making machine bolted to a brick foundation. American Brick Co. v. Drinkhouse, 59 N. J. Law, 462 (1896); machines which are or are to be fastened to specially prepared foundations, and intended as a part of a permanent manufacturing plant. Campbell v. Taylor Mfg. Co., 64 N. J. Eq., 344 (1902); brewery apparatus, all connected and riveted to the building, and made with special reference thereto, and whose removal would be commercially impracticable. Scannell v. Hub. Brew. Co., 178 Mass., 288 (1901); an ice making apparatus masoned to the ground, and so fastened to the building that the latter would have to be taken to pieces in order to remove the tanks. Nason Mach. Co. v. Upham, 26 App. Div., 420 (N. Y., 1898); matte pots, forehearth and truax ore cars, all on wheels, and very heavy, and necessary for a smelting plant. Cary Hardware Co. v. McCarty, 10 Colo. App., 200 (1897); a sheet iron floor necessary for a bone-mill, and tanks, upon the ground, extending through the second floor, connected by pipes to the boiler, although removable without injury. O'Brien v. Hansen, 9 Mo. App., 545, 550 (1881); a planer

weighing seventy-six thousand pounds, not bolted, but requiring a foundation, and connected by belt. Pond Mach. Co. v. Robinson, 38 Minn., 272, 275 (1888); asbestos and magnesia covering for steam piping in a distillery. Angier v. Bay State Co., 178 Mass., 163, 170 (1901); belting and shafting. Mutual Loan Co. v. Gashe, 18 Ohio Circ. Ct., 681, 684 (1895).]

In Stockwell v. Campbell, a portable hot-air furnace placed by the owner of the freehold in a pit prepared for it in the cellar of a house, but not set in brick or otherwise fastened to the house or floor, but held in its place by its own weight, together with the smoke-pipe leading therefrom to the chimney, all capable of removal without injury to themselves or the house, but intended as a permanent annexation, as appeared from the pit in the cellar adapted to its size and depth, were *held*, to be a part of the realty, rendering the whole house subject to a mechanics' lien for the value thereof and the labor of setting them in the house. [A mechanics' lien will attach for two furnaces put into a church. United States Nat. Bank v. Bonacum, 33 Neb., 820, 823 (1892); furnace and pipes in a theater. Thielman v. Carr, 75 Ill., 385, 392 (1874); a hot-air furnace, including pipes, registers, etc., although the furnace rested by its weight alone on a platform of brick built for that purpose in the cellar, and the contract provided that the furnace and pipes should be so put in that they could be "removed without disturbing plastering or defacing ceiling." Cooke v. McNeil, 49 Mo. App., 81 (1892); a furnace enclosed in brick and mortar, and pipes for bringing water from cistern to house. Kent v. Brown, 59 N. H., 236 (1879); Monitor furnaces weighing two thousand five hundred pounds, put up in sections, and cemented to the brick ground-floor, for heating a three-story building constructed to receive such a system of heating; and registers, occupying holes cut into the floors, and nailed thereto, together with the hot-air flues and cold-air ducts. Goodin v. Elleardsville Hall Ass'n, 5 Mo. App., 289 (1878); furnaces and ranges for four houses being erected. Turner v. Wentworth, 119 Mass., 459, 465 (1876); a boiler and furnace built in the cellar of a hotel, in brick and cement, with pipes and heating radiators extending through the hotel. Stebbins v. Culbreth, 86 Md., 656, 657 (1898); range, fire-place heaters, pipes, registers, etc. Schaper v. Bibb, 71 Md., 145 (1889); ranges, boilers, furnaces, pipes and registers connected with the building. Union Stove Works v. Klingman, 20 App. Div., 449 (1897), aff'd 164 N. Y., 589 (1900); iron loops screwed to pipes connecting with hot water radiators and running to the basement of a residence. St. Louis Radiator Co. v. Carroll, 72 Mo. App., 315, 320 (1897); heating, laundry, and cooking apparatus, including a large soup kettle, some of the articles not being fastened in any way, but all for permanent use in a large hotel, and being fixtures under the Pennsylvania rule. Dimmick v. Cook Co., 115 Pa. St., 573 (1887); see, also, Reilly v. Hudson, 62 Mo., 383 (1876), as to an ordinary cooking range. In the following cases the articles named were held not to be fixtures within the mechanics' lien law. A furnace in three sections, weighing fifteen hundred pounds, resting upon, but not fastened to a base of brick-work, incased with brick and mortar. Baldwin v. Merrick, 1 Mo. App., 281 (1876);

a portable heater. Elston v. Jury, 9 Mont. Co. (Pa.), 92 (1892); portable cooking ranges connected with the water pipes of the building. Boston Furnace Co. v. Dimock, 158 Mass., 552, 554 (1893); a portable laundry stove. Harrison v. Homeopathic Ass'n, 134 Pa. St., 558, 565 (1890); Homeopathic Ass'n v. Harrison, 120 Pa. St., 28 (1888); a cylinder stove and funnel for a grist-mill. Lambard v. Pike, 33 Me., 141, 144 (1851); a portable stove connected only to water-pipes. Williams v. Bower, 11 Pa. Co., 151, 152 (1892); a flue-stop to cover a stove-pipe flue opening in a chimney from the interior of the house, and removable at pleasure. Missoula Mercantile Co. v. O'Donnell, 24 Mont., 65, 71 (1900).]

[A mechanics' lien was allowed in the following cases: For a house nailed to posts driven into the ground, with a chimney set in the ground, and extending up through the house. There was no cellar under the house, nor was the house plastered to the chimney. Dodge v. Hall, 168 Mass., 435, 441 (1897); lightning rods. Harris v. Schultz, 64 Iowa, 539, 540 (1884); wall-paper. LaGrill v. Mallard, 90 Cal., 373, 376 (1891); wainscoting, oak veneering, a partition, doors, etc. Matthiesen v. Arrata, 32 Ore., 342, 347 (1897); shelving toe-nailed to the walls and floor, and of different lengths and widths to conform to the contour of the store. Rinzel v. Stumpf, 116 Wis., 287, 291 (1903); gas fittings. Jarechi v. Philharmonic Soc., 79 Pa. St., 403 (1875); chandeliers and bracket lights. McFarlane v. Foley, 27 Ind. App., 484, 488 (1901); gas fixtures. Baum v. Covert, 62 Miss., 113, 120 (1884); but in Jarechi v. Philharmonic Soc., 79 Pa. St., 403 (1875), a lien was denied for gas fixtures. Lien allowed for electric wires, conduits, switches, etc., for lighting a house. Scannevin v. Consolidated Water Co., 55 Atl., 754 (R. I., 1903); an electric passenger elevator. Lefler v. Forsberg, 1 App., D. C., 36, 41 (1893); elevator. Henry & Coatsworth Co. v. Fisherdick, 37 Neb., 207, 222 (1893); see, also Schenck v. Uber, 81 Pa. St., 31, 34 (1876); an Elkins Gas Machine, part being fixed in a brick pit outside, and connected by underground pipes with the remaining part which was firmly fixed to the cellar walls. Pennsylvania Gas Co. v. Gill, 1 Pa. Dist., 538 (1892), aff'g 28 Weekly Nts. Cas., 36 (1891); opera chairs. Grosz v. Jackson, 6 Daly, 463 (N. Y. C. P., 1876); drop-curtains, wings, scenery and other articles constituting the stage outfit of an opera-house. Wayeross Co. v. Sossman, 94 Ga., 100 (1894); pulleys, rollers, curtains, painting, scenery and other stage machinery, and chairs in a theater. Halley v. Alloway, 78 Tenn., 523 (1882); but in Garing v. Hunt, 27 Ont., 149, 151 (1895), a lien was denied for movable scenery. Lien allowed for a windmill. Phelps & Bigelow Co. v. Baker, 49 Kan., 434 (1892); Phelps & Bigelow Co. v. Shay, 32 Neb., 19, 23 (1891); windmill and pump. United States Investment Co. v. Phelps & Bigelow Co., 54 Kan., 144, 146 (1894); a pump planted down on the ground and connected to pipes so as to admit the steam and water. Goss v. Helbing, 77 Cal., 190, 191 (1888); a bolting cloth for a flouring mill, tacked to reels connected with the machinery and steam power, although the reels are removable without injury to the building, and although the cloth may be removed from the reels by extracting the tacks, but which are not ordinarily

removed unless worn out or injured, or unless the mill is to be idle for a considerable time, when it was customary to remove them and clean them and pack them away for protection against moths. Heidegger v. Atlantic Milling Co., 16 Mo. App., 327 (1884); millstones. Wademan v. Thorp, 5 Watts, 115, 116 (Pa., 1836); double-deck cars each having the capacity of carrying five hundred brick, used upon a track built for the purpose in a drier in a brick-yard. Curran v. Smith, 37 Ill. App., 69 (1890); wheels and the axles connecting them, such wheels being fitted to a wooden tramway running through a dry kiln for lumber, and constructed especially for the use of the wheels, and useless without them. Meek v. Parker, 63 Ark., 367 (1897); see Central Tr. Co. v. Sheffield Coal R'y Co., 42 Fed., 106, 110 (U. S. C. C., Ala., 1890), as to coal cars for a mine; a box used in hoisting coal from a mine, and which is connected with other machinery attached to the realty. Dobschuetz v. Holliday, 82 Ill., 371, 376 (1876); four steel tanks, one hundred and five feet long, and six and one-half feet in diameter, put together on the premises, and placed on heavy, solid foundations of concrete and brick, and then having a building erected around them, the whole constituting one structure for the purpose of vulcanizing wood. Haskin Wood Co. v. Cleveland Co., 94 Va., 439, 447 (1897).]

[See Lothian v. Wood, 55 Cal., 159, 163 (1880), that a dancing-hall, resting upon sills, covered and partly weather-boarded around the sides, without doors or windows, and swings consisting of two upright posts set in the ground and braced and connected at the top by a cross-piece with rings in it, are not within the mechanics' lien law. And a mechanics' lien was not allowed in the following cases: mirrors supported by screws attached to a holdfast driven through a wooden plug into the walls, annexed some time after the building had been erected, and easily removed without injury to the walls. Vogel v. Farrand, 55 N. Y. Supp., 977 (1899); tables used as counters. Baum v. Covert, 62 Miss., 113, 120 (1884); tables having no connection with the freehold. Rinzel v. Stumpf, 116 Wis., 287, 291 (1903); hose connected with water-pipe for the protection of a hotel against fire. Latta v. Cambridge Springs Co., 25 Pa. Co., 310 (1901).]

[A mechanics' lien will not be allowed for structures, although fixed to the freehold, where they are temporary and are erected merely to aid in the erection of permanent structures; as scaffolding used in laying brick for a building. Oppenheimer v. Morrell, 118 Pa. St., 189 (1888); forms to hold concrete in place while hardening. Kennedy v. Commonwealth, 182 Mass., 480 (1903); a timber structure put up by a contractor to escape penalty for delay in completing a bridge, and used until steel spans could be obtained. Stimson Mill Co. v. Los Angeles Traction Co., 141 Cal., 30 (1903).]

In Edwards v. Derrickson, 28 N. J. Law, 39 (1859); s. c., 29 Id., 468, a mill flume constructed of wood and leading the water from the dam to the wheel inside the mill, was *held* to be a fixture within the meaning of the Mechanics' Lien Law of New Jersey, providing that "fixed machinery or gearing, or other fixtures for manufacturing purposes shall be considered a

ing dock is neither a building nor a fixture.[2] In such a case, also, buildings and fixtures erected by a lessee for years for the purposes of trade, or property which would otherwise be real, but is made personal property by agreement, and hence is subject to removal as against the owner of the soil, being personal property, are not subject to a mechanics' lien filed against the interest of the tenant or party making the annexation.[3]

building for the purposes of this act,'' etc. [Wires connecting an electric light wire with various houses are ''other fixtures'' although neither the poles nor the houses are on land of the party who owns the wires. Hughes v. Lambertville Light Co., 53 N. J. Eq., 435, 437 (1895).]

[Mechanics' lien allowed for wires, poles, lamps and other attachments in city streets, connected with the power-house, and absolutely necessary to the operation of an electrical plant. Southern Supply Co. v. Rolla Light Co., 75 Mo. App., 622, 629 (1898); Keating Mach. Co. v. Marshall Power Co., 74 Tex., 605 (1889). Likewise, for iron pipe laid under the city streets, and connected with the pumping works. National Pipe Works v. Oconto Water Co., 52 Fed., 43, 51 (U. S. C. C., Wis., 1892), aff'd 59 Fed., 19 (U. S. C. C. A., Wis., 1893); and for pipes in city streets for conducting cold vapor from a factory. Steger v. Arctic Refrigerating Co., 89 Tenn., 453 (1891). A drain-pipe from a house to a sewer in a street is a part of the house within the mechanics' lien law; and it is immaterial whether it is above or under ground, or whether or not the fee of the street is in the owner of the house. Beatty v. Parker, 141 Mass., 523, 526 (1886).]

[A mechanics' lien can not be obtained for rails used in the construction of a street cable railway, as the company has no interest in the land to which the lien can attach; nor can such lien attach to the land upon which the power-house stands and with which the track is connected, as none of the material was used upon such land. Pacific Mills Co. v. James Construction Co., 68 Fed., 966 (U. S. C. C. A., Wash., 1895).]

[A mechanics' lien will not be allowed, against the lessor, for partitions put up by a lessee. Hanson v. News Pub. Co., 97 Me., 99 (1902); nor for trade fixtures erected by a tenant. McMahon v. Vickery, 4 Mo. App., 225 (1877).]

[2] Coddington v. Dry Dock Co., 29 N. J. Law, 550 (1862); s. c., 31 Id., 477.

See, however, *contra*, Olmstead v. McNall, 7 Blackf., 387 (1845), a floating warehouse; Galbreath v. Davidson, 25 Ark., 490 (1869), a wharf-boat.

[3] Church v. Griffith, 9 Penn. St., 117 (1848); White's Appeal, 10 Penn. St., 252 (1849). [Carroll v. Shooting the Chutes Co., 85 Mo. App., 563, 565 (1900); John O'Brien Boiler Co. v. Haydock, 59 Mo. App., 653 (1894); Asheville Co. v. Southwick, 119 N. C., 611, 616 (1896); Honeyman v. Thomas, 25 Ore., 539 (1894); Patterson v. Gallagher, 25 Ore., 227, 228

(1894); Truxall v. Williams, 83 Tenn., 427 (1885); see, also, Belding v. Cushing, 67 Mass., 576 (1854); Waterman v. Stout, 38 Neb., 396, 402 (1893); Kellogg v. Littell & Smythe Co., 1 Wash., 407 (1890).]

[The rule is the same in the case of a licensee of a mine. Springfield Co. v. Cole, 130 Mo., 1, 7 (1895).]

Under sect. 20 of the Mechanics' Lien Law of Ill., an incumbrancer anterior to the mechanics' lien looks only to the land as it was before the lien attached, and the mechanics or material men to the improvement or materials, unless the proceeds will pay both, or there is a surplus of either fund, which, if necessary, may be applied to satisfy the other lien. Moore v. Smith, 26 Ill., 392 (1861). [See First Nat. Bank v. Elmore, 52 Iowa, 541, 550 (1879).]

And if such materials or improvements (steam-boilers and gauge-cocks in this case) become severed from the freehold by fire, the lien is not thereby destroyed; and, if sold, the lien will (in equity) attach to the proceeds. Gaty v. Casey, 15 Ill., 189 (1853); Ellett v. Tyler, 41 Ill., 449 (1866). See, also, Hammer v. Johnson, 44 Ill., 192 (1867), where one-half of the proceeds of the sale of a boiler severed by fire was still *held* liable to lien of the vendor of the mill. [See, *ante*, p. *43.]

See, also, as to the construction of the statutes creating a lien for labor, materials, etc., upon the interest of the lessee, Esterley's Appeal, 54 Penn. St., 192 (1867), where a temporary railroad constructed by a lessee in the slope of a coal mine, was *held* not to be an improvement or a fixture to which a mechanics' lien will attach under the act of 1858, giving a lien upon "improvements, engines, pumps, machinery, screens and fixtures repaired, erected or set up;" McGreary v. Osborne, 9 Cal., 119 (1858).

[Where the statute provided that a lien should be allowed on machinery, fixtures, etc., "capable of being severed or removed from such previous building without material injury thereto," a lien was allowed for new machinery substituted by a tenant in a flouring mill as against the mortgagor of the land claiming such machinery as a part thereof. Slocum v. Caldwell, 12 Ky. L. R., 514 (1890).]

[An agreement between the lessor and lessee that an engine and hoisting apparatus in a mine shall be treated as personalty, can not change their character so far as third parties are concerned, and a mechanics' lien will attach to the leasehold and the fixtures. Dobschuetz v. Holliday, 82 Ill., 371, 374 (1876); Hathaway v. Davis, 32 Kan., 693 (1884); Zabriskie v. Greater Am. Exposition Co., 93 N. W., 958 (Neb., 1903); Hilton Lumber Co. v. Murray, 47 App. Div., 289, 293 (N. Y., 1900). A lien will be allowed where the tenant had the privilege of taking a ground rent. Gaule v. Bilyeau, 25 Pa. St., 521, 523 (1855). Where a lien is authorized by statute, against leasehold interests, it may be claimed for machinery although trade fixtures. Nordyke v. Hawkeye Woolen Co., 53 Iowa, 521, 525 (1880); Forbes v. Mosquito Club, 175 Mass., 432 (1900); Hart v. Globe Iron Works, 37 Ohio St., 75, 77 (1881); but where, by statute, a lien is given upon improvements made by a lessee, it does not extend to such as he has no right to remove. Stenberg v. Liennemann, 20 Mont., 457 (1897).]

*With regard to the question, whether, in the absence [*290] of any specific intention on the subject appearing in the instrument, the article in controversy is or not in law a part of the realty, and so goes with the land to the grantee or mortgagee, the cases are involved in great confusion. It seems, however, conceded by nearly all the authorities that as between grantor and grantee, etc., articles firmly and substantially attached to the freehold by the owner of the inheritance, essential to its full and beneficial enjoyment, adapted and intended to the use and design of the real estate, are parcel thereof and pass therewith.[1] And it is accordingly quite generally held that steam-engines, steam-boilers, etc., shafting and gearing, and other like articles which are usually substantially and permanently attached to the realty, pass by a conveyance or mortgage of the land.[2]

It is on the other hand (with the exception of cases of constructive annexation to be again referred to), quite generally held, that articles of a chattel nature in no wise annexed to the realty do not pass by a conveyance thereof.[3]

[1] See Crane v. Brigham, 11 N. J. Eq., 29, 36 (1855); Brennan v. Whitaker, 15 Ohio St., 446 (1864). See, also, *ante* p. *275, note (3). [Fratt v. Whittier, 58 Cal., 126, 130 (1881); Leonard v. Stickney, 131 Mass., 541, 542 (1881); Farmers' L. & T. Co. v. Minneapolis Works, 35 Minn., 543 (1886); Canning v. Owen, 22 R. I., 624, 628 (1901).]

[2] See cases cited *ante* p. *275, note (3).

[All machinery immediately connected with and operated by gearing and shafting, instead of by belting, is as much a part of the realty as the gearing and shafting. Scheifele v. Schmitz, 42 N. J. Eq., 700, 701 (1887).]

[3] See Kirwan v. Latour, 1 Har. & John., 289 (1802), where it was *held* on a sale on execution of a distillery with the improvements, that vats, buckets, pickets and faucets, not fixed to the freehold, did not pass; McClintock v. Graham, 3 McCord, 553 (1826), *semble* as to a still set up in a rock furnace built against the wall of the house, being a mere temporary thing not indispensably necessary to the enjoyment of the land, nor actually fixed to any part of the freehold; Swift v. Thompson, 9 Conn., 63 (1831); Bennett v. Allen (1857), 2 Clint. N. Y. Dig., p. 1416, pl. 48, 49; Walker v. Sherman, 20 Wend., 636 (1839); Baker v. Davis, 19 N. H., 325, 332 (1849); Hutchinson v. Kay, 23 Beav., 413 (1857), looms having their legs set into iron cups dropped into holes in the pavement, but otherwise not fixed; Despatch Line v. Bellamy Manf'g Co., 12 N. H., 205 (1841); Pierce v. George, 108 Mass., 78 (1871); Brown v. Lillie, 6 Nev., 244 (1870), a saw-mill built upon timbers lying upon the surface of the ground, with brick-work constructed upon those timbers, and the engine,

boiler and machinery attached to it, constructed for the purpose of sawing the timber within a convenient distance and then to be removed to some other locality where there was timber, *held*, to be a mere chattel, not passing by a patent of the land; *Ex parte* Astbury, L. R., 4 Ch. App., 630 (1869), weighing-machines placed on brick-work in holes in the ground faced with brick, but not otherwise affixed; also similar machines placed on wheels.

[The following articles do not pass as a part of the realty: Casks, tubs, coolers, swimmers, ice-tools, a rotary pump, pitching machine and kettle, some of them very ponderous, and constructed for permanent use, and essential for a brewery, but not physically attached. Wolford v. Baxter, 33 Minn., 12, 18 (1884); packing-cases, bottles and casks in a brewery. Fitzgerald v. Atlanta Ins. Co., 61 App. Div., 350, 355 (N. Y., 1901); see, also, Scobell v. Block, 89 Supr. Ct. (82 Hun), 223 (N. Y., 1894); a stove pattern in a foundry. Sampson v. Graham, 96 Pa. St., 405, 409 (1880); patterns and tools. Foote v. Gooch, 1 S. E., 529 (N. C., 1887); tools. Williams' App., 1 Monaghan, 274 (Pa., 1889); a planer kept in position upon timbers by its own weight, a hoisting-block and chain connected by a hook to an eye fastened above but readily disconnected, turning lathes and a drill press connected by belting. Roddy v. Brick, 42 N. J. Eq., 218 (1886); a planer. Canada Sav. Co. v. Merchants' Bank, 3 Man., 285 (1886); a steam winch bolted to a large stone upon the floor. Irish Bldg. Soc. v. Mahony (1876), 10 Irish R. Law, 363, 369; boilers not attached. Hacker v. Munroe, 176 Ill., 384 (1898), aff'g 61 Ill. App., 420 (1895); 56 Ill. App., 532, 540 (1894); Early v. Burtis, 40 N. J. Eq., 501, 502 (1885); Schreiber v. Malcolm, 8 Gr. Ch., 433 (Ont., 1860); a shed, the posts thereof set in the ground, a boiler set in a brick furnace built upon and in the ground, and saw-mill machinery, all easily detached. Young v. Baxter, 55 Ind., 188, 193 (1876); a saw-mill needed upon land no longer than necessary to work the timber. Burrill v. Wilcox Lumber Co., 65 Mich., 571, 575; a portable saw-mill and engine, moved from place to place as business required. Henkle v. Dillon, 15 Ore., 610, 616 (1888); see, also, Kendall v. Hathaway, 67 Vt., 122, 126 (1894); a cotton-gin and band. Gresham v. Taylor, 51 Ala., 505, 507 (1874); Smith v. Odom, 63 Ga., 499, 503 (1879); a hop-press, removable by taking up a portion of the flooring. Sherrick v. Cotter, 28 Wash., 25 (1902); a porgy jenny, platform scale, windlasses and reel flyers, not annexed. Knickerbocker Trust Co. v. Penn Cordage Co., 58 Atl., 409, 410 (N. J., 1904); machinery not attached. Landenberger v. Berges, 15 Phila., 96, 97 (1882); hay-scales, hung upon hooks in a pit prepared for them. Markle v. Houck, 19 Up. Can., Q. B., 164, 167 (1860); a green-house not attached. Royce v. Latshaw, 15 Colo. App., 420, 425 (1900).]

See, also, Peck v. Brown, 5 Nev., 81 (1869); Woodruff v. Roberts, 4 La. Ann., 127 (1849); Carpenter v. Lewis, 6 Ala., 682 (1844); Wincher v. Shrewsbury, 3 Ill., 283 (1840); Robertson v. Phillips, 3 G. Greene, 220 (1851), cases where cordwood, timber, boards, rails (not laid in a fence), brick, etc., cut and made on government land, were *held* not to pass with

the land to a subsequent purchaser, though still remaining thereon; Crouch v. Smith, 1 Md. Ch., 401 (1849), and Cook v. Whiting, 16 Ill., 480 (1855), hewed timber, posts, etc., lying on the land; Noble v. Sylvester, 42 Vt., 146 (1869), a stone split out from the ledge for the purpose of a tomb; Woodman v. Pease, 17 N. H., 282 (1845), a stone quarried and brought from a distance into a door-yard for the purpose of being made into a door-step, but not actually so placed.

[The following do not pass as a part of the realty: Wood cut and piled upon State land. Schmidt v. Vogt, 8 Ore., 344, 347 (1880); timber cut upon Government land. Brock v. Smith, 14 Ark., 431 (1854); trees cut. Jenkins v. Lykes, 19 Fla., 148, 158 (1882); Fitzpatrick v. Hoffman, 104 Mich., 228, 230 (1895); Ind. School Dist. of W. Point v. Werner, 43 Iowa, 643, 644 (1876); Hickey v. Rutledge, 98 N. W., 974 (Mich., 1904); poles in a pile. Yale v. Seely, 15 Vt., 221, 232 (1843); lumber. Howell v. Barnard, 32 Ill. App., 120, 121 (1889); see, also, Banfil v. Twyman, 71 Ill. App., 253, 255 (1896), aff'd 172 Ill., 123 (1898); stakes and boards piled upon a farm, and intended for general repairs. Hinkle v. Hinkle, 69 Ind., 134, 136 (1879); unused fence rails. McCarthy v. McCarthy, 20 Can. Law T., Occ. N., 211, 212 (Co. Ct., Ont., 1900); see, also, Reyman v. Mosher, 71 Ind., 596 (1880); rails and brick. Thweat v. Stamps, 67 Ala., 96, 98 (1880). Where a land-owner, after partition, took down a fence which was useless, and piled up the rails, they did not pass to a subsequent grantee; nor is the grantor estopped from claiming them because the deed describes the premises as "being the same premises which were assigned by said commissioners in partition." Harris v. Scovel, 85 Mich., 32 (1891). Cord-wood does not pass. Barrett v. Choen, 119 Ind., 56, 58 (1888); see, also, Frank v. Magee, 50 La. Ann., 1066, 1068 (1898); slabs, saw-dust, shavings and other refuse matter piled up for firewood. Jenkins v. McCurdy, 48 Wis., 628 (1879); a stepping-stone having the name of the owner cut therein, and vases weighing two hundred pounds, not fastened any way, and whose position had been shifted several times. Pfluger v. Carmichael, 54 App. Div., 153, 154 (N. Y., 1900); vases upon garden walls and upon pedestals, stone lions, and potted plants, although the pots were sunk. Nisbet v. Mitchell-Innes (1880), 17 Scot. Law Rep., 438; marble slabs upon a counter, for ornament, the counter being complete without them. Harmony Bldg. Ass'n v. Berger, 99 Pa. St., 320, 324 (1882).]

So, generally, as to machines kept in their place by their weight alone and worked by movable belts. *Re* Trevy, 14 L. T. (N. S.), 193 (1866), where the same rule was applied where there was an iron so placed as to prevent the belt from being totally removed, the machine being held in place by its weight only; Rogers v. Brokaw, 25 N. J. Eq., 496 (1875); Longbottom v. Berry, L. R., 5 Q. B., 123 (1869); s. c., 39 L. J. (N. S.), Q. B., 37; *Re* Dawson, Ir. L. R., 2 Eq., 218 (1868); Gale v. Ward, 14 Mass., 352 (1817); Holbrook v. Chamberlin, 116 Mass., 155 (1874), a portable wood-cutting machine; Cole v. Roach, 37 Tex., 413 (1872); Taffe v. Warnick, 3 Blackf., 111 (1852); Tobias v. Francis, 3 Vt., 425 (1830).

[Connection by belting is not sufficient to make a machine a part of the realty. United States v. Friction-Match Mach., 1 Haskell, 32, 35 (U. S. Dist. Ct., Me., 1866); Shepard v. Blossom, 66 Minn., 421, 424 (1896); Atlantic Trust Co. v. Atlantic City Laundry Co., 64 N. J. Eq., 140 (1902); Scheifele v. Schmitz, 42 N. J. Eq., 700, 701 (1887); Kendall v. Hathaway, 67 Vt., 122, 126 (1894); Haggert v. Brampton, 28 Can., 174, 183 (1897); Patterson v. Johnson, 10 Gr. Ch., 583 (Ont., 1864); Gooderham v. Denholm, 18 Up. Can. Q. B., 203 (1859); Carseallen v. Moodie, 15 Up. Can. Q. B., 304; Sun Assurance Co. v. Taylor, 9 Man., 89, 98 (1893). A copper cooler in a brewery, which, when in use, is attached to the building by a rubber hose, but, during the winter, is detached and stored away, does not pass under a mortgage of the land. Wolford v. Baxter, 33 Minn., 12, 19 (1884). A small steam pipe for heating, as readily disconnected by a coupling as casting off a belt, is not a sufficient annexation to constitute a machine a fixture. Pope v. Jackson, 65 Me., 162 (1876); Hyman v. Gordon, Ohio Prob., 189, 193 (1889); but see Atlantic Trust Co. v. Atlantic City Laundry Co., 64 N. J. Eq., 140 (1902).]

Annexation is not, however, regarded as necessary in Pennsylvania and some other States. See *ante* p. *20, notes, and *post* in this chapter.

See, also, East v. Ealer, 24 La. Ann., 129 (1872), brick in a kiln *held* not to pass; Key v. Woolfolk, 6 Rob. (La.), 424 (1844); Nimmo v. Allen, 2 La. Ann., 451 (1847); Civil Code La., Arts. 459, 460, 464, 465, 468; Wiltshear v. Cottrell, 1 Ell. & Bl., 674 (1853); *Re* Hitchings, 4 Nat. Bank. Reg. (2d ed.), 384. [Taylor v. Plunkett, 56 Atl., 384 (Del., 1903); Southbridge Bank v. Mason, 147 Mass., 500, 505 (1888); Hillebrand v. Nelson, 95 N. W., 1068, 1070 (Neb., 1901); Crane Iron Works v. Wilkes, 64 N. J. Law, 193, 194 (1899); Bayne v. Brewer Pottery Co., 90 Fed., 754 (U. S. C. C., Ohio, 1898); Lea v. Shakespeare, 10 Mont. Co. (Pa.), 171 (1893); Burke v. Weiss, 1 Luz. Leg. Reg. R., 310; Sun Assurance Co. v. Taylor, 9 Man., 89 (1893); see, also, Reyman v. Henderson Nat. Bank, 98 Ky., 748, 752 (1896).]

[The weight or size of a machine is no criterion in determining whether or not it is a fixture, unless the size be such that the machine can not be removed without damaging the building. Roddy v. Brick, 42 N. J. Eq., 218, 225 (1886).]

[The following articles were held not to pass with the realty: A movable platform scale on wheels; belting usable in connection with individual machines which are personalty, and not usable without them. Knickerbocker Trust Co. v. Penn Cordage Co., 62 N. J. Eq., 624, 642 (1901); saws and belting removed from a mill, and stored in a small building upon the premises by a tenant upon removing therefrom, with request to one, who afterwards preempted the land, to see that they were not disturbed. McKiernan v. Hesse, 51 Cal., 594, 596 (1877); belting which may be removed by unloosening. See *Re* Welch, 108 Fed., 367, 368 (U. S. Dist. Ct., N. Y., 1901); counter, sideboard, meatblock, meatrack and ice box. Griffin v. Jansen, 19 Ky. L. R., 19 (1897); awnings and signs. Wilson v. Steel, 13 Phila., 153, 154 (1879); but see Cosgrove v. Troescher, 62 App. Div., 123, 125 (N. Y., 1901); pump. Dutro v. Kennedy, 9 Mont., 101, 105

*Between these two extremes there are cases laying [*291] down different and contradictory rules. The cases involving this conflict have usually arisen concerning articles of machinery (other than the engine, shafting and permanent machinery), used in mills and manufacturing establishments. Some cases *have gone so far as to lay down the rule of the common [*292] law as applicable to mills and manufactories, to be, that, whenever the article can be removed without essential injury to the freehold or to the article itself, it is a chattel; otherwise it is a fixture.[1] This rule seems, however, entirely

(1889); electric switch-boards, electric signs, announcing the plays in a theater, electric fans and stage scenery. New York Life Ins. Co. v. Allison, 107 Fed., 179 (U. S. C. C. A., N. Y., 1901); stage scenery, not permanently affixed, nor specially designed nor fitted for the building, but could be and had been used in other playhouses. Bender v. King, 111 Fed., 60, 70 (U. S. C. C., Mont., 1901); opera chairs of stock pattern screwed to the floor. Andrews v. Chandler, 27 Ill. App., 103, 110 (1887); piano, desk, chair, baggage-truck, stepladder, center-table, settee in a theater, although necessary to make it a "going concern." Oliver v. Lansing, 59 Neb., 219, 228 (1899); organ in a church. Caraher v. Royal Ins. Co., 70 Supr. Ct. (63 Hun), 82, 95 (N. Y., 1892); ash-cans. Cosgrove v. Troescher, 62 App. Div., 123 (N. Y., 1901); a safe weighing about eight thousand pounds, resting upon a brick foundation, and enclosed by brick walls so that it could not be removed without tearing down a part of the wall, and a burglar proof, combination-lock iron chest weighing about three thousand pounds. Moody v. Aiken, 50 Tex., 65 (1878); Sheldon v. Cook, 11 Chi. Leg. News, 76 (Ill. App., 1878); office furniture. Scudder v. Anderson, 54 Mich., 122, 125 (1884); Atlantic Tr. Co. v. Atlantic C'y Laundry Co., 64 N. J. Eq., 140 (1902); settees. Chapman v. Union Mut. L. Ins. Co., 4 Ill. App., 29, 33 (1879); a cabinet and mantel pieces not attached. L'Hote v. Fulham, 51 La. Ann., 780, 784 (1899); mantel-mirrors. Wilson v. Cummings, 53 N. Y. St. R., 584, 585 (1893), a portable, sectional dance floor. Security T. Co. v. Temple Co., 58 Atl., 865 (N. J. Ch., 1904).]

[1] See Wade v. Johnston, 25 Geo., 331 (1858); also, Hill v. Wentworth, 28 Vt., 428, 433 (1856); Fullam v. Stearns, 30 Vt., 443, 452 (1857); Bartlett v. Wood, 32 Vt., 372 (1859); Harris v. Haynes, 34 Vt., 220, 225 (1861); Sweetzer v. Jones, 35 Vt., 317 (1862); Hunt v. Mullanphy, 1 Mo. (1st ed.), 508 (1825); Graves v. Pierce, 53 Mo., 429 (1873). [Ottumwa Mills Co. v. Hawley, 44 Iowa, 57, 63 (1876); Willis v. Munger Mach. Co., 13 Tex. Civ. App., 677, 682 (1896); Dowall v. Miln (1874), 1 Sess. Cas., 4th Ser., 1180.]

See, however, Degraffenreid v. Scruggs, 4 Humph., 451 (1844); Philipson v. Mullanphy, 1 Mo., 620 (1826); Davenport v. Shants, 43 Vt., 546 (1871); and cases cited in the following pages. [Watertown Steam En-

gine Co. v. Davis, 5 Houston, 192, 214 (Del., 1877); Roddy v. Brick, 42 N. J. Eq., 218, 224 (1886); Newhall v. Kinney, 56 Vt., 591, 593 (1884).]

In Fullam v. Stearns, machinery placed by the mortgagor in a bedstead-manufactory and grist-mill, consisting of a planing-machine, a machine for cutting screws, a turning-lathe, circular-saw and frame, and a boring-machine, all fastened to the building by being spiked to the floors, studs and posts, and propelled by water, the turning-lathe and planing-machine being very large and heavy and requiring to be taken to pieces to be removed from the mill, but all which could be and in fact were removed without material injury either to the building or machinery, were *held* to be personal property and not a part of the realty.

In Hill v. Wentworth, an iron boiler in a paper-mill, set in brick-work laid on a stone foundation placed in the ground up to which the floor was laid, but attached to the building in no other way, together with the iron pipe connected with it by screws and bolts; engines for grinding rags into pulp, fixed in tubs standing on timbers up to which the floors of the building were scribed, operated by a band from shafting but not otherwise attached; paper-presses with screws of iron the lower ends of which passed through the floor but in no other way attached to the floor, the upper ends surrounded by cleats nailed to the floor overhead to keep them in place, which by removing some iron nuts could be removed without injuring the building; calender rolls in an iron frame standing on timbers spiked to the floor and with the toes of the frames screwed to the timbers; a rag-cutter in a wooden frame standing on the floor but in no other way confined; a trimming-press set in a frame screwed to the floor; a machine for making paper standing on the floor and in no way fastened except by cleats nailed round it to the floor; all put up by the mortgagors and necessary and usual for the manufacture of paper in paper-mills and designed to be used there permanently for that purpose except when being repaired as occasion required, were, as between mortgagor and mortgagee, *held* to be personal property.

So, in Harris v. Haines, as to stoves and pipes used for warming the shop; a turning-lathe upon a frame braced from the floor above to secure the lathe, but not otherwise fastened; and circular saws and arbors confined in tables braced in the same manner.

So, in Sweetzer v. Jones, as to saw-frames in a marble-mill fastened at the top to timbers by a bolt and nut, and extending to timbers on the ground and fastened to them with a cast iron step put on the bottom of the upright and making a kind of tenant in the building, but capable of being removed without injury. See, also, chap. 1, p. *17, note.

[If removal would have substantially injured the property so as to endanger the security of the lien, annexation will be conclusive. Clore v. Lambert, 78 Ky., 224, 231 (1879).]

[Machinery imbedded in the walls and floors so that a removal would impair the building, or destroy the machinery, is annexed so as to become a part of the realty. McMillan v. Fish, 29 N. J. Eq., 610 (1878).]

[Machines which can not be taken out without destroying them are fixtures. Fish v. N. Y. Paper Co., 29 N. J. Eq., 16, 19 (1878).]

*too arbitrary, and to be opposed to the weight of [*293] modern authority.

Other cases reject entirely the doctrine that physical annexation is a necessary attribute of a fixture, making the test whether the article passes as a fixture, to be its having been fitted and prepared to be used with, and being essential to the beneficial enjoyment of the realty.[1]

The true rule is, however, believed to be the one already laid down in the first chapter of this work,[2] making the question depend upon the united application of several tests, viz.: real or constructive annexation to the realty; appropriation or adaptation to the use or purpose of that part of the realty with which it is connected; and lastly, the intention of the party making the annexation to make the article a permanent or habitual accession or annexation to the freehold.[3] And the general course of decision is in favor of viewing everything as a fixture and as passing by a conveyance of the land, which has been attached to the realty with a view to the purpose for which it is employed or held, however slight or temporary the connection between them,[4] provided, of course, that such

[1] See the cases cited in chap. 1, p. *20, note.

[2] *Ante*, p. *21.

[3] This subject having been already considered at some length (*ante* p. *21) reference is made to that portion of the work, without again repeating it here.

The decision of the question in some cases seems to have been influenced by considering whether the annexation is accessory to a matter of a personal nature, as a trade. See Heermance v. Vernoy, 6 John., 5 (1810); Teaff v. Hewitt, 1 Ohio St., 511, 535 (1853); Farrar v. Chauffetete, 5 Den., 531 (1848). What has been said on this subject in chap. 6, p. *216, is believed to be equally applicable here.

The subject considered in the text is sometimes regulated by statute. See Civil Code of La., Arts. 455, 460; Gary v. Burguieres, 12 La. Ann., 227 (1857).

[4] See Philipson v. Mullanphy, 1 Mo., 620 (1826); Rogers v. Crow, 40 Mo., 95 (1867); Johnson v. Wiseman, 4 Met. (Ky.), 357, 360 (1863); Crane v. Brigham, 11 N. J. Eq., 29, 35 (1855). See, also, Pierce v. George, 108 Mass., 78 (1871). [Ottumwa Mill Co. v. Hawley, 44 Iowa, 57 (1876); Roddy v. Brick, 42 N. J. Eq., 218, 225 (1886); McMillan v. Fish, 29 N. J. Eq., 610, 612 (1878); Fish v. N. Y. Paper Co., 29 N. J. Eq., 16 (1878); Blancke v. Rogers, 26 N. J. Eq., 563, 568 (1875); Knickerbocker Trust Co. v. Penn Cordage Co., 58 Atl., 409, 410 (N. J., 1904); Pratt v.

[*294] *attachment be intended as a permanent or habitual one, which in the absence of evidence to the contrary will in this relation ordinarily be presumed.[5]

Quite a numerous class of cases, however, lay down the rule, that, if articles of machinery used in a factory for manufacturing purposes, are only attached to the building to keep them steady and in their places, so that their use as chattels may be

Baker, 99 Supr. Ct. (92 Hun), 331, 333 (N. Y., 1895); McCrillis v. Cole, 55 Atl., 196, 198 (R. I., 1903); Sinker v. Comparet, 62 Tex., 470, 476 (1884); Shelton v. Ficklin, 32 Gratt., 727, 735 (Va., 1880); Patton v. Moore, 16 W. Va., 428, 437 (1880); Bacon v. Lewis, 33 Can. Law J., 680 (Ont., 1897); see, also, Fratt v. Whittier, 58 Cal., 126, 132 (1881); Shepard v. Blossom, 66 Minn., 421, 424 (1896); Davidson v. Westchester Gas-Light Co., 99 N. Y., 558, 569 (1885); Richmond v. Freemans Nat. Bank, 86 App. Div., 152, 158 (N. Y., 1903); Wade v. Donau Brewing Co., 10 Wash., 284, 289 (1894); Miles v. Ankatell, 25 Ont. App., 458 (1898), reversing 29 Ont., 21 (1897).]

["The mere fact that they were adapted to be used in this factory, and that they were necessary to carry on the business is not enough of itself to impress on them the character of realty. The same thing is true of the tools used by hand in the manufacture there carried on." Hubbell v. East Cambridge Bank, 132 Mass., 447, 449 (1882).]

[Machines prepared and completely finished at the place of manufacture, ready for use in any locality, removable without injury, show no adaptation to make fixtures. Penn Mutual Ins. Co. v. Semple, 38 N. J. Eq., 575, 585 (1884).]

[5] See Potter v. Cromwell, 40 N. Y., 287 (1869); Tifft v. Horton, 53 N. Y., 382 (1873). [See, *ante*, p. *43. Arnold v. Crowder, 81 Ill., 56, 58 (1876); Ottumwa Mill Co. v. Hawley, 44 Iowa, 57, 64 (1876); Hopewell Mills v. Taunton Bank, 150 Mass., 519, 522 (1890); Robertson v. Corsett, 39 Mich., 777, 782; Davis v. Mugan, 56 Mo. App., 311, 316 (1893); Keefer v. Merrill, 6 Up. Can. App., 121 (1881); Temple Co. v. Penn Mut. Ins. Co., 69 N. J. Law, 36 (1903).]

[A corporation formed "to conduct a general building and wood-working business, to buy lands and to erect thereon buildings for manufacturing purposes, and machinery necessary and incident thereto," and which was organized for fifty years, erected a building and placed therein machinery adapted to the purpose for which incorporated. *Held*, to show that the annexation was permanent. Lee v. Hubschmidt Bldg. Co., 55 N. J. Eq., 623, 626 (1897).]

[Where there is no special adaptation of machines to the place where used, nor any preparation of the place to receive them, but were constructed after fixed patterns for all purchasers, mere heavy and complicated tools, movable without detriment to the building, and equally suitable elsewhere, they are not a part of the realty covered by a mortgage.

more beneficial, and are attached in such a way that they can be removed without any essential injury to the freehold or to the articles themselves, they still remain personal property, and do not pass by a conveyance or mortgage of the freehold.[6] And it has accordingly been held that the machinery in cotton and woolen mills, or other similar manufactories, consisting of looms, yarn-reels, speeders, cards, twisters, spinning-frames, willows, mule-beamers, spreaders, balling-machines, spoolers, etc., secured to the floor by cleats nailed to the floor around the feet, or by screws or bolts passing through holes in the feet into the floor, or in other similar ways, so attached as to keep them steady in their positions, and capable of being removed without injury to themselves or the building, are mere chattels, not passing with the realty.[7]

Keeler v. Keeler, 31 N. J. Eq., 181, 191 (1879). Blancke v. Rogers, 26 N. J. Eq., 563, 568 (1875). But in Ottumwa Mill Co. v. Hawley, 44 Iowa, 57 (1876), the court did not seem to attach any weight to the argument that the machines were entire and complete, and were equally well adapted to any woolen mill.]

[Personal property does not become realty by mere use in connection with land, though long continued. Keeler v. Keeler, 31 N. J. Eq., 181, 193 (1879).]

[6] See Hill v. Wentworth, 28 Vt., 429 (1856); Fullam v. Stearns, 30 Vt., 452 (1857); Bartlett v. Wood, 32 Vt., 372 (1859); Sweetzer v. Jones, 35 Vt., 317 (1862); also the authorities cited in the note next below. [Long v. Cockern, 128 Ill., 29 (1889), aff'g 29 Ill. App., 304 (1888); McConnell v. Blood, 123 Mass., 47, 49 (1877); Maguire v. Park, 140 Mass., 21 (1885); Hubbell v. East Cambridge Bank, 132 Mass., 447, 449 (1882); Penn Mut. Ins. Co. v. Semple, 38 N. J. Eq., 575 (1884); Keeler v. Keeler, 31 N. J. Eq., 181, 191 (1879); Blancke v. Rogers, 26 N. J. Eq., 563, 567 (1875); Keve v. Paxton, 26 N. J. Eq., 107, 109 (1875); Brown v. Roland, 92 Tex., 54, 57 (1898); Neufelder v. Third Street R'y, 23 Wash., 470 (1900); Chase v. Tacoma Box Co., 11 Wash., 377 (1895); Cherry v. Arthur, 5 Wash., 787, 788 (1893); Washington Nat. Bank v. Smith, 15 Wash., 160, 168 (1896); Schreiber v. Malcolm, 8 Gr. Ch., 433 (Ont., 1860); Sun Assurance Co. v. Taylor, 9 Man., 89, 101 (1893); see, also, Taylor v. Watkins, 62 Ind., 511 (1878); Carpenter v. Walker, 140 Mass., 416 (1886).]

[7] See Swift v. Thompson, 9 Conn., 63 (1831); Gaylor v. Harding, 37 Conn., 508 (1871); McKim v. Mason, 3 Md. Ch. Dec., 186 (1852); Graves v. Pierce, 53 Mo., 429 (1873); Tobias v. Francis, 3 Vt., 425 (1830); Sturges v. Warren, 11 Vt., 433 (1839); Vanderpool v. Van Allen, 10 Barb., 157 (1850); Cresson v. Stout, 17 John., 116 (1819); Murdock v. Gifford, 18 N. Y., 28 (1858); Teaff v. Hewitt, 1 Ohio St., 511 (1853), in which

[*295] *On the other hand it seems to be settled in England and Ireland that articles similarly annexed and for similar purposes are part of and pass with the realty.[1] And the rule last

case, however, it is stated (p. 535) that the articles, looms, carding machines, etc., were subject to removal to suit convenience, and not intended as a permanent accession to the freehold, though this seems a deduction of the court from the mode of annexation, use, etc.; Wade v. Johnston, 25 Geo., 331 (1858). See, also, Gale v. Ward, 14 Mass., 352 (1817); Capen v. Peckham, 35 Conn., 88 (1866); Waterfall v. Penistone, 6 Ell. & Bl., 876, 889 (1856); Hellawell v. Eastwood, 6 Exch., 295 (1851), a case between landlord and tenant; Parsons v. Hind, 14 W. R., 860 (1866); Graves v. Pierce, 53 Mo., 423 (1873), a case of a mechanics' lien; Hutchinson v. Kay, 23 Beav., 413 (1857), where, however, the looms were not fixed, but merely steadied by having their four iron legs set into four iron cylinders surmounted by iron cups dropped into holes in the flag pavement, such cups not being in any way fastened to the flooring, nor the legs fastened into the cups; Walker v. Sherman, 20 Wend., 636 (1839); Rogers v. Brokaw, 25 N. J. Eq., 496 (1875), where a planer and matcher, and a moulder in a sash and blind factory, weighing respectively about 3,600 lbs. and 2 tons, resting directly on the floor, their position being changeable as convenience might require, one of them fastened to the floor by screws passing through the feet, but easily unscrewed and removed, and not intended to be made permanent annexations to the factory, were *held,* not to pass by a mortgage of the realty.

[The following cases hold that machines attached to keep them steady, are not a part of the realty: Hubbell v. East Cambridge Bank, 132 Mass., 447 (1882); Wheeler v. Bedell, 40 Mich., 693, 695 (1879); Knickerbocker Trust Co. v. Penn Cordage Co., 62 N. J. Eq., 624 (1901); Case v. Arnett, 26 N. J. Eq., 459, 461 (1875); Campbell v. John W. Taylor Co., 62 N. J. Eq., 307 (1901); Crane Iron Works v. Wilkes, 64 N. J. Law, 193, 194 (1899); Wells v. Maples, 22 Supr. Ct. (15 Hun), 90, 92 (N. Y., 1878); Hart v. Sheldon, 41 Supr. Ct. (34 Hun), 38, 46 (N. Y., 1884); Case Mfg. Co. v. Garven, 45 Ohio St., 289 (1887), reversing Garven v. Hogue, 14 Wkly. Cin. Law Bul., 175 (C. C., 1885); Case v. L'Oeble, 84 Fed., 582, 585 (U. S. C. C., Pa., 1897); Cherry v. Arthur, 5 Wash., 787, 788 (1893); Keefer v. Merrill, 6 Up. Can. App., 121 (1881); Carscallen v. Moodie, 15 Up. Can. Q. B., 304; see, also, Atlantic Trust Co. v. Atlantic City Laundry Co., 64 N. J. Eq., 140, 146 (1902); Price v. Jenks, 14 Phila., 228 (1880); Gooderham v. Denholm, 18 Up. Can. Q. B., 203 (1859); Dowall v. Miln (1874), 1 Sess. Cas., 4th Ser., 1180.]

[1] Longbottom v. Berry, L. R., 5 Q. B., 123 (1869); S. C., 39 L. J., Q. B., 37; 10 B. & S., 584; 22 L. T. (N. S.), 385. The machinery in this case was such as was necessary for the purposes of manufacturing woolen, and was in general fixed to the floor, roof, or side walls in "a *quasi* permanent manner," viz.: by screws or bolts, or bolts with screws at the top thereof, fastened in holes in the floor by pouring melted lead around them,

mentioned has also received considerable support in the United States.[2]

or by pegs driven through holes in the framework of the machines into holes in the floor; and without being fixed in such a manner in order to keep it steady and from moving, it could not have been effectually used; Holland v. Hodgson, L. R., 7 C. P., 328 (1872); *Re* Dawson, Ir. L. R., 2 Eq., 218 (1868); s. c., 16 W. R., 424; Barnett v. Lucas, 5 Ir. Com. Law, 140, 145 (1870). See, also, Boyd v. Shorrock, L. R., 5 Eq., 72 (1867); s. c., 37 L. J., Ch., 144; 17 L. T. (N. S.), 197; 16 W. R., 102; Climie v. Wood, L. R., 3 Exch., 257; s. c., 37 L. J. Exch, 158; 18 L. T. (N. S.), 609; L. R., 4 Exch., 328 (1869); 38 L. J., Exch., 223; 20 L. T. (N. S.), 1012, where the jury finding that the articles were of the kind called trade fixtures, it was regarded as immaterial that they found also that they were affixed by the mortgagor for their better use and not to improve the inheritance, and that they could be removed without any appreciable damage to the freehold. It was observed by Willes, J., in this case (38 L. J., Exch., 223), that "the finding of the jury does not say that they were annexed for their more convenient use *as chattels*. That would have been Hellawell v. Eastwood [6 Exch., 295], over again; but the finding would plainly have been contrary to the fact;" and, it might have been added, contradictory to the preceding word fixtures; Wiltshear v. Cottrell, 1 Ell. & Bl., 674 (1853); s. c., 22 L. J., Q. B., 177; 17 Jur., 758; 18 Eng. L. & Eq., 142, where a threshing machine, fixed by bolts and screws, was *held* to pass either as a part of the land or a fixture.

See, however, Parsons v. Hind, 14 W. R., 860 (1866), an hydraulic press in a factory, fixed by brick and mortared to the floor, but not essential to the factory; this case was, however, decided mainly on the question of intention, though Hellawell v. Eastwood was cited approvingly. See, also, the Irish case of The Patent Peat Co., 17 L. T. (N. S.), 69 (1867), a drilling-machine, bolted to a bench by four light bolts, and the bench secured by four spikes to keep it steady, *held* not to be a fixture passing by a demise by way of mortgage.

[See the following cases holding that machines pass as a part of the realty: Crawford v. Findlay, 18 Gr. Ch., 51, 54 (Ont., 1871); McDonald v. Weeks, 8 Gr. Ch., 297 (Ont., 1860); Sun Assurance Co. v. Taylor, 9 Man., 89, 97 (1893); Adamson v. McIlvaine, 3 Man. Law, 29 (1885); Cross v. Barnes (1877), 46 L. J., Q. B., 479, 480; see, also, Haggert v. Brampton, 28 Can., 174, 181 (1897); Reynolds v. Ashby [1903], 1 K. B., 87; Arkwright v. Billings (1819), Fac. Dec., Scot.; M'Ley v. Howie (1902), 40 Scot. Law Rep., 170, looms bolted to an iron sole-plate resting by its own weight, the upper part of the looms being tied by substantial iron stays to the roof.]

[2] See Parsons v. Copeland, 38 Me., 537 (1854); Symonds v. Harris, 51 Me., 14 (1862); Trull v. Fuller, 28 Me., 545 (1848); Christian v. Dripps, 28 Penn. St., 271 (1857); Deal v. Palmer, 72 N. C., 582 (1875), where the carding-machine was fastened only by its weight; Baker v. Davis, 19

[*296] *In Longbottom v. Berry, Hannen, J., in delivering the opinion of the court, referring to the manner of the fixing, said: "This fixing was clearly necessary, for they could not otherwise be effectually used; and for the same reason the fixing was obviously not occasional, but permanent. It is no doubt

N. H., 325 (1849); Harlan v. Harlan, 15 Penn. St., 507 (1850); s. c., 20 Id., 303 (1853). [Hopewell Mills v. Taunton Bank, 150 Mass., 519 (1890); Langdon v. Buchanan, 62 N. H., 657, 660 (1883); Helm v. Gilroy, 20 Ore., 517, 522 (1891); see *Ex parte* Makepeace, 31 N. C., 91 (1848).]

A cotton-gin placed by the owner of the land in a gin-house, but not fastened to the floor in any manner, a piece of plank being nailed to the floor and the front ledge of the gin resting against this plank to prevent its moving when the band is applied and the gin at work, such being the usual way of securing a gin in its place, is *held* to be a fixture passing with the land as between vendor and vendee or mortgagor and mortgagee. Latham v. Blakely, 70 N. C., 368 (1874); Bond v. Coke, 71 N. C., 97 (1874); Bratton v. Clawson, 2 Strobh., 478 (1848); s. c., 3 Strobh., 127; Fairis v. Walker, 1 Bail., 540 (1830); Richardson v. Borden, 42 Miss., 71 (1868); Tate v. Blackburne, 48 Miss., 1 (1873), so *held* in this case also as to a cotton-press fixed by being let into notches in the sills and secured by wedges. See, also, McDaniel v. Moody, 3 Stew. (Ala.), 314 (1831).

[A smutter held in position in a mill by braces from the joists, and connected by belting with shafting, which is essential and necessary to the mill, but which could be removed without injury to the mill, passes under an execution-sale of the land, as against one who allowed the mill-owner to so attach it. Stillman v. Flenniken, 58 Iowa, 450, 454 (1882).]

[The following articles were held part of the realty as between a mortgagee of the land, and a purchaser of the machinery: Looms, fastened to the floor by screws; carders, weighing eighteen hundred pounds kept in position by their own weight; spinning-jacks held by cleats nailed to the floor, and by iron rods to the ceiling; shafting and belting connecting the machines. Ottumwa Mill Co. v. Hawley, 44 Iowa, 57 (1876).]

[A mortgage covers, as against a chattel mortgagee, two looms weighing fifteen hundred pounds each resting upon the flooring by their weight alone, and connected by belting with shaft, being necessary for a woolen mill. Cavis v. Beckford, 62 N. H., 229 (1882).]

However, in Cole v. Roach, 37 Tex., 413 (1872), and Hancock v. Jordan, 7 Ala., 448 (1845), contrary decisions were made, the court, however, in the last named case, laying some stress upon the fact that the conveyance was not of the land as a cotton plantation; and indeed, there seems no more reason for holding these machines, when kept in place simply by their weight, to be fixtures, than any other articles totally disconnected with the realty, as there seems to have been the case. See, also, Farrar v. Stackpole, and other cases cited *ante* p. *17, *et seq.*, and notes; Pierce v. George, 108 Mass., 78 (1871).

said in this case that the object of fixing was to insure steadiness and keep the machines in their places when worked; but the *same thing could probably be said of most trade fix- [*297] tures, from a steam-engine downwards, and if the effect of this fixing is to cause the whole set of machines to be effectually used in the manufacture of wool and cloth, it seems very difficult to avoid coming to the conclusion that a necessary consequence is to cause the mill to be put to a more profitable use as a wool-mill than it otherwise would be. It is also equally difficult to conceive that a machine which at all times requires to be firmly fixed to the freehold for the purpose of being worked, could truly be said never to lose its character as a movable chattel."

With reference to the rule above stated, that such articles of machinery as are attached to the building merely to keep them steady in their places, so that their use as chattels may be more beneficial, etc., are mere chattels, it is to be observed that the use of the words "as chattels," seems to assume the whole point in controversy.[1] The rule itself, however, seems to have been adopted by the weight of authority in this country, though as has been seen, in England and Ireland it is otherwise. Properly the question seems in each case to be one of mixed law and fact, determinable in accordance with the rule already laid down, as seems to have been done in some of the cases cited.[2] If, however, the article has been attached merely for a temporary purpose with the intention of removing it again, it does not properly become an irremovable accession to the land.[3] It is

[1] See Holland v. Hodgson, quoted from, in note below.

[2] See Teaff v. Hewitt; Rogers v. Brokaw, cited (*ante*). See, also, Walmsley v. Milne, 7 C. B. (N. S.), 115 (1859); Holland v. Hodgson, L. R., 7 C. P., 328 (1872); Farrar v. Chauffetete, 5 Den., 527 (1848). See next note [and, *ante*, p. *24.]

[3] See Crane v. Brigham, 11 N. J. Eq., 29, 35 (1855); Randolph v. Gwynne, 7 N. J. Eq., 88 (1848); Rogers v. Brokaw, 25 N. J. Eq., 496 (1875); Kelly v. Austin, 46 Ill., 156 (1867).

In Kelly v. Austin, A. executed a mortgage upon certain premises to B., and afterwards, together with his partner in the trade of house joiners, with the labor, materials and means of the firm, erected for trade purposes a carpenter shop on the premises. It was slightly built of rough materials, and placed upon blocks resting on boards laid on the surface of the ground, and in no manner let into the ground, and seemed to be designed for no other than a temporary use; *held*, that it did not pass to the

purchaser at a sale of the premises under the mortgage. See, also, Pennybacker v. McDougal, 48 Cal., 160 (1874). [See, *ante*, p. *69.]

In Randolph v. Gwynne (which seems rather a strong application of the rule), the facts were as follows: In 1839 A. bought of B. a mill-seat and a saw-mill thereon, and gave back a mortgage for the unpaid purchase money. He afterwards converted the premises into paper-mills, putting in a new water-wheel, the mill being complete as a mill to be driven by the water power on the premises. Several seasons previous to 1845 being so unusually dry that the water was insufficient to drive the mill at all times, A. placed a steam-engine in the basement fastened on a stone and brick foundation by bolts and nuts, and applied the power directly to the driving-wheel, so that the machinery moved precisely as if the wheel was turned by water. In 1847 and 1848 there being no deficiency of water, in the spring of 1848, A. contracted to sell the engine and was about removing it when enjoined; *Held*, that the mill being complete without it, and, except in dry seasons, it being useless, and it being removable without injury to the mill, it did not become subject to the mortgage.

In Holland v. Hodgson, L. R., 7 C. P., 328, 337 (1872), (also quoted from *ante*, p. *30), Blackburn, J., referring to this subject said: "As we have already observed, trade or tenant fixtures might in one sense be said to be fixed 'merely for a temporary purpose'; but we cannot suppose that the Court of Exchequer meant to decide that they were not part of the land, though liable to be severed by the tenant. The words 'merely for a temporary purpose' must be understood as applying to such a case as we have supposed, of the anchor dropped for the temporary purpose of mooring the ship, or the instance immediately afterwards given by Parke, B., of the carpet tacked to the floor for the purpose of keeping it stretched whilst it was there used, and not to a case such as that of a tenant who, for example, affixes a shop counter for the purpose (in one sense temporary) of more effectually enjoying the shop whilst he continues to sell his wares there. Subject to this observation, we think that the passage in the judgment in Hellawell v. Eastwood [6 Exch., 295 (1851)], does state the true principles, though it may be questioned if they were in that case correctly applied to the facts. The court in their judgment determine what they have just declared to be a question of fact, thus: 'The object and purpose of the connection was not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels.'" See Hellawell v. Eastwood, commented upon also in Mather v. Fraser, 2 Kay & J., 536 (1856); Regina v. Lee, L. R., 1 Q. B., 244, 254 (1866); Longbottom v. Berry, L. R., 5 Q. B., 123, 137 (1869); Barnett v. Lucas, 5 Ir. Com. Law, 145 (1870).

[A small playhouse, upon no foundation, built of pieces of board picked up by the children of the neighborhood, and nailed together and to the fence, is not part of the realty. Kirchman v. Lapp, 19 N. Y. Supp., 831, 832 (1892).]

[A weather-vane, with the owner's name upon it for advertising pur-

*also clear that mere articles of furniture movable in [*298] their nature, though temporarily fastened while in use, do not become a part of the realty nor pass therewith, *e. g.*, hangings, pier-glasses, chimney-glasses, book-cases, carpets, curtains and the like.[1]

*It is, perhaps, settled by the weight of American [*299] authority (though the reason of the thing seems to be the other way) that the so-called gas fixtures, consisting of gas chandeliers and burners, screwed upon the gas pipe in the usual way

poses, does not pass with the realty. Harmony Bldg. Ass'n v. Berger, 99 Pa. St., 320, 324 (1882).]

[Chairs screwed to the floor of a hippodrome, the Town Council requiring that they be fastened, are not part of the realty. Lyon v. London C'y Bank [1903], 2 K. B., 135.]

[1] See note (3) *ante* p. *297; also *ante* p. *222, and notes; Shaw v. Lenke, 1 Daly (N. Y.), 487 (1865); Walker v. Sherman, 20 Wend., 646 (1839), per Cowen, J.; Parsons v. Hind, 14 W. R., 860 (1866), *arguendo,* the clock in court. [McKeage v. Hanover Ins. Co., 81 N. Y., 38, 40 (1880), aff'g 23 Supr. Ct. (16 Hun), 239 (1878); Durkee v. Powell, 75 App. Div., 176 (N. Y., 1902); Cosgrove v. Troescher, 62 App. Div., 123, 125 (N. Y., 1901); Manning v. Ogden, 77 Supr. Ct. (70 Hun), 399, 400 (N. Y., 1893); Hall v. Law Trust Soc., 22 Wash., 305 (1900); Nisbet v. Mitchell-Innes (1880), 17 Scot. Law Rep., 438, 440; see, also, Oliver v. Lansing, 59 Neb., 219, 228 (1899); Lea v. Shakespeare, 10 Mont. Co. (Pa.), 171 (1894).]

In Beck v. Rebow, 1 P. Wms., 94 (1706), on a bill against the executor of covenantor for the specific performance of articles containing covenants to grant to plaintiff "all the pictures upon the stair-case, over the doors and chimney-pieces, and all things fixed to the freehold of the messuage," *held,* that pier-glasses, hangings and chimney-glasses fixed with nails and screws to the freehold with no wainscot under them, were only matters of ornament and furniture, and not to be taken as part of the house or freehold. See, also, Birch v. Dawson, 6 C. & P., 658 (1834); s. c., 2 Ad. & E., 37 (1834).

[A mirror, removable without injury, matching in style and finish other woodwork in the room, does not pass with the realty, although leaving an unpapered wall back of it. Loan v. Gregg, 55 Mo. App., 581, 583 (1893); Cranston v. Beck, 56 Atl., 121 (N. J., 1903). In the latter case it was said that the character of such mirrors was not changed by the fact that, while title to them was in an executor, he conveyed the real estate, it not being shown that the executor had any estate in the land. See, however, Spinney v. Barne, 43 Ill. App., 585, 586 (1892), where a console mirror firmly attached to the chimney breast, of the same finish as other woodwork in the room, and which could not be removed without injury, passed to the vendee of the realty. Smith v. Maclure (1884), 32 W. R., 459, 460.]

are not fixtures, but mere articles of furniture, and hence do not pass upon a conveyance of the premises;[2] though as to gas-

[2] Montague v. Dent, 10 Rich. Law, 135 (1856), so held as between the purchaser at a mortgage sale and an execution creditor; Vaughen v. Haldeman, 33 Penn. St., 522 (1859); Rogers v. Crow, 40 Mo., 91 (1867); Shaw v. Lenke, 1 Daly (N. Y.), 487 (1865). See, also, Lawrence v. Kemp, 1 Duer, 363 (1852); Steuart v. Douglas (1870), Brown Fixt., Appendix A. [Fratt v. Whittier, 58 Cal., 126, 133 (1881); L'Hote v. Fulham, 51 La. Ann., 780, 788 (1899); Towne v. Fiske, 127 Mass., 125, 131 (1879); Capehart v. Foster, 61 Minn., 132, 133 (1895), where it is said that "while this doctrine is rather doubtful in principle, it is too well established to be now overturned." McKeage v. Hanover Ins. Co., 81 N. Y., 38, 40 (1880), aff'g 23 Supr. Ct. (16 Hun), 239 (1878); Cosgrove v. Troescher, 62 App. Div., 123, 125 (N. Y., 1901); Manning v. Ogden, 77 Supr. Ct. (70 Hun), 399, 400 (N. Y., 1893); Kirchman v. Lapp., 19 N. Y. Supp., 831, 832 (1892); Jarechi v. Philharmonic Soc., 79 Pa. St., 403, 405 (1875); Wilson v. Steel, 13 Phila., 153, 154 (1879); Lea v. Shakespeare, 10 Mont. Co. (Pa.), 171 (1894); Hall v. Law Trust Co., 22 Wash., 305 (1900); see, also, Iden v. Sommers, 18 N. Y. Supp., 189 (1892); Daniels v. Detwiler, 14 Mont. Co. (Pa.), 58 (1898); Condit v. Goodwin, 89 N. Y. Supp., 827 (1904).]

Contra, Johnson v. Wiseman, 4 Met. (Ky.), 357 (1863); Sewell v. Angerstein, 18 L. T. (N. S.), 300 (1868), at *nisi prius* per Willes, J., the judges of the court of C. P. agreeing with him; *Ex parte* Acton, 4 L. T. (N. S.), 261 (1861); *Ex parte* Wilson, 2 Mont. & Ayr., 61 (1835). See, also, *Ex parte* Morrow, 1 Lowell's Dec., 386 (1869); s. c., 2 N. B. R. (2d ed.), 665. [Berliner v. Piqua Club, 66 N. Y. Supp., 791 (1900); Stack v. Eaton, 4 Ont. Law, 335; Security T. Co. v. Temple Co., 58 Atl., 865 (N. J. Ch., 1904); Cunningham v. Seaboard R. Co., 58 Atl., 819 (N. J. Ch., 1904).]

In rendering his judgment in Sewell v. Angerstein, Willes, J., said: "The gaseliers are part of the gas pipes, and to use a legal expression, they take their nature and are included in the fixtures which go with the house under the lease. They are as much a part of the gas pipes as the millstones are part of the mill. Although the gaseliers may be unscrewed and taken off without injuring the freehold, they are necessary to the enjoyment of the gas pipes which are of no practical use when separated from them; * * * They form part of the freehold and were a part of the thing let just as much as a pump-handle is a part of the pump; the handle may no doubt be removed without injury to the pump, but then the pump would be of no use without the handle." [Smith v. Maclure (1884), 32 W. R., 459, 460.]

[Gas lustres and brackets are not fixtures. Nisbet v. Mitchell-Innes (1880), 17 Scot. Law Rep., 438.]

[The fact that a chandelier is exceptionally large is immaterial. New York Life Ins. Co. v. Allison, 107 Fed., 179, 183 (U. S. C. C. A., N. Y., 1901).]

fittings, or the pipes upon which the fixtures are screwed the rule is otherwise.[3]

*Though there are some decisions to the contrary,[4] it [*300] seems very clear that stoves set up in the way they usually are at the present day, are mere furniture and do not pass by a conveyance of the house wherein they are.[5] Other illustrations

[Renting the property to a tenant with the gas fixtures does not alone indicate that the owner intended to alter their character. Penn Ins. Co. v. Thackara, 15 Phila., 264, 265 (1881), aff'd 13 Rep., 731 (Pa., 1882).]

[Gas fixtures are not covered by a policy of insurance upon a building. Thurston v. Union Ins. Co., 17 Fed., 127, 129 (U. S. C. C., N. H., 1883).]

[Hall lamps attached in the usual way of gas-fixtures, do not pass under a mortgage as part of the realty. Chapman v. Union Mut. Ins. Co., 4 Ill. App., 29, 33 (1879). But in Smith v. Maclure (1884), 32 W. R., 459, 460, a table lamp screwed to an india-rubber tube fixed to the floor, was *held* to be a part of the realty.]

[Electric-light fixtures are not a part of the realty. Canning v. Owen, 22 R. I., 624, 631 (1901). Dynamos and engines with their connections for lighting a theater, are not fixtures, where the building was prepared to be lighted by gas, and the electric lighting system was introduced for temporary economy. New York Life Ins. Co. v. Allison, 107 Fed., 179, 183 (U. S. C. C. A., N. Y., 1901).]

[3] Ackroyd v. Mitchell, 3 L. T. (N. S.), 236 (1860); *Ex parte* Acton, 4 L. T. (N. S.), 261 (1861); *Ex parte* Wilson, 2 Mont. & Ayr., 61 (1835). [Smith v. Maclure (1884), 32 W. R., 459, 460; see Atkinson v. Noad, 14 Low. Can., 159 (1863).]

Gasometers and apparatus for generating gas would, it seems, also pass with the inheritance to the heir or grantee as fixtures. Hays v. Doane, 11 N. J. Eq., 84, 96 (1855).

[By analogy, the wiring of an electric lighting system would be a part of the realty, though the chandeliers and their appurtenances would not be. New York Life Ins. Co. v. Allison, 107 Fed., 179, 183 (U. S. C. C. A., N. Y., 1901).]

[4] Goddard v. Chase, 7 Mass., 432 (1811). Franklin stoves fixed in the fire-places of a house in the usual manner (not, however, stated in the report), *held* to pass to the vendee on a sale of the house, in Smith v. Heiskell, 1 Cranch. C. C., 99 (1802). See, also, Folsom v. Moore, 19 Me., 252 (1841).

So, as to a stove standing in its place, the fire-place having been closed up with brick and the pipe going through a thimble. Blethen v. Towle, 40 Me., 310 (1855); in this case it was also *held* that stoves taken down and stowed away for the summer did not pass. See, also, Tuttle v. Robinson, 33 N. H., 104 (1856). The stoves held to pass in these cases were probably more or less securely annexed to the house.

[5] Williams v. Bailey, Sup. Ct. Mass., Essex, April 1801, 3 Dane's Abr.,

will be found in the note below.[6] Gas fixtures or other fixed furniture may, however, when such is the intention of the owner

152, § 25; Freeland v. Southworth, 24 Wend., 191 (1840). See, also, Tuttle v. Robinson, 33 N. H., 104, 107 (1856). [Cosgrove v. Troescher, 62 App. Div., 123, 125 (N. Y., 1901).]

[Although connected by pipes with a hot water boiler; and the fact that there were twenty-four stoves—one for each apartment in a building, although it gives a suggestion of permanence, will not avail as against a conditional seller, in favor of a mortgagee of the building. Jennings v. Vahey, 183 Mass., 47 (1903).]

[Portable furnaces do not pass as a part of the realty. Towne v. Fiske, 127 Mass., 125, 131 (1879); Rahway Sav. Inst. v. Irving Baptist Ch., 36 N. J. Eq., 61 (1882); Duffus v. Howard Furnace Co., 8 App. Div., 567 (1896), reversing 37 N. Y. Supp., 19 (1895); see, also, Elston v. Jury, 9 Mont. Co. (Pa.), 92 (1892).]

[Likewise, as to ranges and heaters, although connected with water-pipes. Kerby v. Clapp, 15 App. Div., 37, 38 (N. Y., 1897); Burke v. Weiss, 1 Luz. Leg. Reg. R., 310.]

[Likewise, as to a Baltimore heater, being a stove so placed in the chimney as to heat one or more rooms above it. Harmony Bldg. Ass'n v. Berger, 99 Pa. St., 320, 324 (1882).]

[The fact that a stove is placed in a pit made to receive a stove will not make it a fixture any more than a bedstead will be made a fixture by being placed in an alcove made to receive a bedstead. Rahway Sav. Inst. v. Irving Baptist Ch., 36 N. J. Eq., 61, 65 (1882).]

[A mortgage does not cover radiators standing upon the floor, and screwed to steam-pipes. National Bank v. North, 160 Pa. St., 303 (1894); see, also, Mott Iron Works v. Middle State Co., 17 App., D. C., 584, 593 (1901).]

[Grates do not pass as a part of the realty. Nisbet v. Mitchell-Innes (1880), 17 Scot. Law Rep., 438.]

[6] A cupboard fitted into a recess and fastened there by nails or screws, *held*, not to pass with the realty, in Blethen v. Towle, 40 Me., 310 (1855).

But where in the erection of a church a recess was left to receive the organ which was required to complete the architectural design and finish of the building, the organ being fastened to the platform built to receive it by nails driven through the outer case into the floor, and the wall in the rear of the organ being in a rough and unfinished state and pretty much without ceiling or finish, it was *held* that it was to be considered as annexed to the freehold and passed by a sale of the realty. Rogers v. Crow, 40 Mo., 91 (1867). See, also, Snedeker v. Warring, 12 N. Y., 170 (1854); D'Eyncourt v. Gregory, L. R., 3 Eq., 382 (1866). [An organ nineteen feet wide, eleven feet deep, and twenty-two feet high, fastened to the floor by two tenpenny nails, passes under a mortgage of the church building. Chapman v. Union Mut. L. Ins. Co., 4 Ill. App., 29, 34 (1879). Mirror frames, hat-racks, and umbrella stands annexed to and designed for

a building in the process of construction, and corresponding in material with the inner surface, and whose removal would leave unfinished walls, are a part of the realty. Ward v. Kilpatrick, 85 N. Y., 413, 420 (1881).]

So, marble and imitation marble slabs, placed by the owner in a house belonging to him after its completion, and resting upon, but not fastened to, brackets screwed into the walls, are a part of the furniture of the house, and do not pass to the vendee. Weston v. Weston, 102 Mass., 514 (1869). See, also, *Ex parte* Morrow, 1 Lowell's Dec., 386 (1869); s. c., 2 N. B., R. (2d ed.), 665.

[Where, for about three years mantels were not fastened in any way, but were afterwards fastened to the wall to keep them from toppling, and the wall concealed by the mantels was plastered and kalsomined, such mantels are not fixtures covered by a mortgage. Philadelphia Mort. Co. v. Miller, 20 Wash., 607, 612 (1899). In this case, Dunbar, J., in delivering the opinion of the court, says: "In investigating a question of this kind, we can not shut our eyes to the many changes that have been wrought by time in the fashion and character of household furnishings. Anciently, mantels were uniformly built as a part of the house, and therefore became a fixture to the realty. The house was built with reference to the mantel and the mantel with reference to the house. It was a part of the plans and specifications of the house, and could not have been removed without materially affecting, not only the appearance, but the real usefulness of the house. But advancing mechanical science and taste have evolved an altogether differently constructed mantel, and mantels such as are described by the testimony in this case are now constructed without reference to any particular house or particular fireplace. They are what are called 'stock' mantels, and are sold separately and made adaptive to any kind of a house. They are, in fact, as much a separate article of merchandise as a bedstead or table. So that, regarding the changed conditions in this respect, the rules of law must be changed and adapted to the changed character of the furniture. A few years ago, sideboards were constructed in, and were made a part of the house, and were, of necessity, fixtures; while now they are ordinarily separate pieces of furniture and, by common consent, are moved from one house to another. The same advancement has been made in bath tubs. The old fashioned bath tub, that was sealed in and actually made a part of the bath room, has largely given place to the more convenient bath tub, that rests upon legs and can be attached to any heating system that happens to prevail in the house where it is used. And so with heaters or boilers. In this instance the boiler is in no way attached to the building, excepting by its plumbing connections. It could be detached without in any way injuring the realty; and we see no reason why it should be considered a fixture any more than the ordinary stove which is connected by pipes with the boiler and to the plumbing system generally. One could be as easily detached as the other, and yet we think it has never been held by any court, or contended by any one, that a stove, though connected by pipes to the plumbing system, was a fixture which could not be removed."]

of the fee evidenced by according acts, become a permanent accession to and pass with the realty like other fixtures.[7]

[Slate mantels hung upon hooks are no part of the realty. Cottrell v. Griffin, 18 N. Y. Wkly. Dig., 270 (Supr. Ct., 1883).]

[Cornice-poles are fixtures, but the valences are not; nor are the mantel boards, which lie upon unfixed mantelpieces. Smith v. Maclure (1884), 32 W. R., 459, 460.]

[Picture-rods, grates, and trellis work in a fernery, do not pass as a part of the realty. Nisbet v. Mitchell-Innes (1880), 17 Scot. Law Rep., 438).]

[Pictures on canvas stretched upon wooden frames, fastened by plates and screws to the wall, do not pass with the realty, although, if removed, it would leave a bare stone wall. Cochrane v. Stevenson (1891), 18 Sess. Cas., 4th Ser., 1208.]

[Likewise, as to marble wainscoting, water-closets, piping, and a storm-door. Schreyer v. Jordan, 58 N. Y. Supp., 206 (1899); chairs screwed to the floor of a hippodrome. Lyon v. London City Bank [1903], 2 K. B., 135; a filter, connected only by pipes. Sayles v. National Water Co., 16 N. Y. Supp., 555, 557 (1891).]

[An elevator is not such a fixture so firmly attached to the realty as to compel the buyer to accept it. Morse v. Arnfield, 15 Pa. Super., 140 (1900).]

[7] Funk v. Brigaldi, 4 Daly, 359 (1873). In this case, during negotiations for the sale of a house, the plaintiff (the owner), as an inducement to defendant to purchase, informed him that, "the house was complete and ready for him to move into, and that all he had to do was to walk in and light the gas, as it was complete." *Held*, that this statement being uncontradicted by the plaintiff, was sufficient evidence to show that the gas fixtures had been annexed by the owner "to enhance the general value of the estate and not for its temporary enjoyment," and that therefore they became a part of the realty and passed with the deed. Steuart v. Douglas (1870), Brown Fixt., Append. A.

In *Ex parte* Acton, 4 L. T. (N. S.), 261 (1861), and *Ex parte* Wilson, 2 Mont. & Ayr., 61 (1835); s. c., 4 Dea. & Chit., 143; 4 L. J. (N. S.), Bank., 24, before cited, the gas burners, etc., were accessory to a mill, and the cases may probably be distinguished on that account.

[An intention is shown to make gas fixtures a part of a hotel where the builders placed the expense of such fixtures in the "construction account," which was carried to the "real estate account;" and by the fact that the builders did not intend to conduct the hotel themselves, but to lease it, and the gas-fixtures were leased as a part of the building; such intent is farther shown by the fact that the chandeliers were designed especially for this building, and are of great value in connection therewith, but of insignificant value if removed; and, farther, a presumption that the builders did not regard the gas-fixtures as personal property is shown by their not including them in their tax return of "personal property." Central Trust Co. v. Cincinnati Hotel Co., 26 Weekly Law Bulletin (Super. Ct. of

*What is requisite in order to constitute a constructive [*301] annexation of a chattel to the realty, has already been considered in a preceding chapter,[1] and will not be here repeated. It has long been well settled that articles constructively annexed to the realty, pass by a conveyance thereof, though not actually united thereto.[2] It is also well settled that articles which are

Cincinnati), 149; and in Fratt v. Whittier, 58 Cal., 126, 132 (1881), such intention was shown by the globes being lettered "Orleans Hotel." See McFarlane v. Foley, 27 Ind. App., 484, 485 (1901); Temple Co. v. Penn Mut. Ins. Co., 69 N. J. Law, 36 (1903).]

[A portable heater and gas-fixtures, although personal property, will pass under a deed where the grantor orally agrees that they should go with the house. Heysham v. Dettre, 89 Pa. St., 506, 508 (1879).]

[Where a building was intended to be used as a club, whatever articles are substantially a part of it and can not be removed without depriving it of that which was intended to be used with it, ought to be included in a mortgage of such building. Smith v. Maclure (1884), 32 W. R., 459.]

[1] *Ante* p. *33.

[2] As upper mill-stones though raised to be picked. Wystow's Case of Gray's Inn, 14 H. 8, 25, pl. 6 (1522); Liford's Case, 11 Co., 50 b (1614); Place v. Fagg, 4 Man. & Ry., 277 (1829); s. c., 7 L. J., K. B., 195; Walmsley v. Milne, 7 C. B. (N. S.), 115 (1859); s. c., 6 Jur. (N. S.), 125; 29 L. J., C. P., 97; 1 L. T. (N. S.), 62; 8 Am. Law Reg., 373. Wystow's Case will be found translated in 4 Man. & Ry., 280, note (g).

So, as to doors, windows, keys, etc. See Wystow's Case; Liford's Case (*supra*); Shep. Touch., 90; Pettengill v. Evans, 5 N. H., 54 (1829); State v. Elliott, 11 N. H., 540 (1841). See, also, Wood v. Bell, 6 Ell. & B., 355, 362 (1856); s. c., 25 L. J., Q. B., 321, where Jervis, C. J., said: "I think those things pass which have been fitted to the ship and have once formed a part of her, as, for instance, a door hung upon hinges, although afterwards removed for convenience. I do not think the circumstance that materials have been fitted and intended for the ship makes them part of the ship."

[So, as to a watchman's clock. Haggert v. Brampton, 28 Can., 174, 182 (1897).]

So, rough planks laid down, but not nailed, as an upper floor of a gin-house and used to spread cotton-seed upon, have been held to be fixtures and to pass by a conveyance of the land. Bryan v. Lawrence, 5 Jones' Law, 337 (1858). The grounds of this decision were that the planks were an essential part of the house; and it was observed by Battle, J., in delivering the opinion, that, "had they been laid upon the sleepers in piles, for safe-keeping or for convenience, or spread there to dry, and not to be used with the house, they might have been regarded as personal chattels, and, of course, would not have been included in the sale of the land." It was,

however, *held*, in Noyes v. Terry, 1 Lans. (N. Y.), 219 (1869), that unattached scantling, which had been used to hang tobacco on to cure in a barn built on a farm where tobacco had been raised, which were not fitted into the barn, but were put up or taken down as they were or were not wanted for the drying of the tobacco, and at the time of the sale were partly piled up in the barn, and partly used as a scaffolding for straw, no tobacco having been raised on the farm for a year or two previously, did not pass as fixtures by a conveyance of the land. See, also, Whiting v. Brastow, 4 Pick., 310 (1826).

So, as to rails laid into a fence, though not otherwise connected with the land than by their weight. Seymour v. Watson, 5 Blackf., 555 (1841); Burleson v. Teeple, 2 G. Greene, 542 (1850); Mitchell v. Billingsley, 17 Ala., 391 (1850); Glidden v. Bennett, 43 N. H., 306 (1861); Sawyer v. Twiss, 26 N. H., 348 (1853). [Kimball v. Adams, 52 Wis., 554, 556 (1881).]

So, as to the materials thereof, though accidentally or temporarily detached without intent to divert them from their use as a part of the fence. Goodrich v. Jones, 2 Hill, 142 (1841). See, also, Climer v. Wallace, 28 Mo., 556 (1859); Collins v. Bartlett, 44 Cal., 371 (1872).

Quaere, however, as to a portable fence composed of posts and boards erected on public land, and resting wholly on the surface thereof, which it seems is personalty. Pennybacker v. McDougal, 48 Cal., 160 (1874).

But where A. grants part of a lot of land to B., bounding such part on a straight line between two monuments, and stipulating that a fence partly on the line and partly on the land conveyed, should still belong to the grantor; and afterwards grants the rest of the land to C., bounding it on the same straight line; *held*, that that part of the fence standing on the land of B. did not pass by such conveyance. Ropps v. Barker, 4 Pick., 239 (1826).

It was said in Conklin v. Parsons, 1 Chand., 240 (1849); s. c., 2 Pinney, 264, that "the better opinion is, that where rails have been placed along the line of any intended fence, for the purpose of being laid into the fence, though not actually applied to that use, they pass by a deed of the land, there having been a manifest appropriation to the use of the land." The opinion was also expressed in Ripley v. Page, 12 Vt., 353 (1839), that such materials pass "the same as the materials of a fence accidentally fallen down or purposely taken down to be immediately reconstructed." This doctrine is, however, opposed to the rule that mere intention to annex unaccompanied by any act towards carrying that intention into effect, is insufficient to constitute a fixture, and is believed to be unsound. See Cook v. Whiting, 16 Ill., 480 (1855); *ante*, pp. *39, note, and *40, note. See, however, *dicta* in McLaughlin v. Johnson, 46 Ill., 163 (1867); Noble v. Sylvester, 42 Vt., 146 (1869), *ante*, p. *40.

Hop-poles, necessarily used in cultivating hops (which have perennial roots continuing for a series of years) though taken down for the purpose of gathering the crop and piled in heaps in the hop-yard with a view of being re-set in the season of hop-raising, are a part of the realty and pass

by a sale on the foreclosure of a mortgage executed prior to their being placed in the hop-yard; and they can not be sold by the executor of the deceased mortgagor as personal property. Bishop v. Bishop, 11 N. Y., 123 (1854). See Noyes v. Terry, 1 Lans., 219, 222 (1869) (*supra*).

The rule as to machines is that "the chattel must be something which belongs to the machine as a part of it." *Ex parte* Astbury, L. R., 4 Ch. App., 630 (1869). [Gooderham v. Denholm, 18 Up. Can. Q. B., 203, 219 (1859); Crawford v. Findlay, 18 Gr. Ch., 51, 54 (Ont., 1877). Necessary parts of fixed machines, neither being practically available for the purpose for which it was used without the other, are real estate. Haggert v. Brampton, 28 Can., 174, 182 (1897). So, as to loom beams, not fastened to but essential parts of the looms, and laid upon them when in use. Hopewell Mills v. Taunton Bank, 150 Mass., 519, 523 (1890).]

So, as to the rolls including duplicates and different sizes of an iron rolling-mill, they being a constituent and necessary part of the machinery, though they are not all in the housings, but in part temporarily dis-annexed and lying loose in the mill. Voorhis v. Freeman, 2 W. & S., 116 (1841); Pyle v. Pennock, 2 W. & S., 390 (1841). In this case also *held* that the plates of defective boiler-iron covering the floor of the mill and kept down simply by their weight, but which are an indispensable part of the mill, pass with the mill. See these cases commented on in chapter 1, p. 19. Same points also held in *Ex parte* Astbury, L. R., 4 Ch. App., 630 (1869); s. c., 38 L. J., Bank., 9; 20 L. T. (N. S.), 997; 17 W. R., 997. In this case it was also *held* that rolls not fitted to their bearings in the machine and prepared for use, were not fixtures. See, also, Johnson v. Mehaffey, 43 Penn. St., 308 (1862); Mather v. Fraser, 2 K. & J., 536 (1856); Metropolitan Counties, etc., Society v. Brown, 26 Beav., 454 (1859); Burnside v. Twitchell, 43 N. H., 390 (1861); *Ex parte* Acton, 4 L. T. (N. S.), 261 (1861); Fisher v. Dixon, 12 Cl. & Fin., 312 (1845); Peck v. Batchelder, 40 Vt., 233 (1867).

In Peck v. Batchelder, double windows were made for a house and fitted to its window casings; they were not nailed or fastened in, but were held by being closely fitted and pushed in, and remained in one winter and until warm weather, when they were taken out and set away in the house, the building having in it all the windows for which it was constructed at the time of the conveyance. Blinds were also made for the side-lights in the hall, but never fitted to the windows or put in, but simply set up by the windows. Both windows and blinds were not intended by the grantor to pass with the house, but were secreted so that the grantee did not at the time of the purchase know of their existence, there being nothing about the house or windows to indicate that the double windows or blinds belonged thereto. *Held*, that never having been actually or constructively annexed to the house, they did not pass by the conveyance.

See, however, the Scotch case of Johnston v. Dobie, Mor. Dict., 5443 (1783). In this case Johnston executed in favor of his wife *et al.* a disposition of the whole estate heritable and movable that should belong to him at the time of his death, which, as he lived only a few days after the date

[*302] *usually actually annexed to, and form a part of the realty, do not lose the character of realty, and become chattels by a severance for a temporary purpose only, as for repairs, and [*303] pass *by a conveyance of the land notwithstanding such severance.[1] But where the severance is not for a temporary

of the deed, was at the instance of his heir reduced *ex capite lecti*, "so far as respects the heritable subjects thereby conveyed." When J. died a house was being erected for him in which a set of doors and windows, etc., were then lying, in order to be fixed in their proper places in the building, and a question arising as to them between the heirs and disponees, the former contending that along with the house they had fallen under the heritable succession, and the latter claiming them as movable subjects, it was *held*, by a majority of the court that in cases like this, where the will of the proprietor so strongly marked is being carried into execution by overt acts, such *animus* should have full effect, and that the articles of unfixed work were parts of the house by destination.

So, in Texas a wooden cistern set upon blocks by the house to catch water for the use of the inmates, and used and depended upon for that purpose, in which State in many instances cisterns are substitutes for wells, and where a house or farm without a cistern would often be considered almost uninhabitable, is *held* to be as much a part of the realty as the key to the door, and to pass with the land. Cole v. Roach, 37 Tex., 413 (1872). So held, also, in Blethen v. Towle, 40 Me., 310 (1855), as to a wooden cistern sitting upon blocks in the cellar and filled by conductors from the outside of the house.

See, also, Rufford v. Bishop, 5 Russ., 346 (1829); s. c., 7 L. J., Ch., 108, 114, where an iron chest and a set of book-shelves near it, the wall being cut away to admit them, were considered as fixed to the freehold. In this case (7 L. J., Ch., 114), the M. R. said: "If a wall is cut away to admit a thing, that thing must be considered as fixed to the freehold." [See, as to a safe for permanent use in a factory, Haggert v. Brampton, 28 Can., 174, 183 (1897); and as to tubs, vats and casks designed for a brewery and essential to a brewery, Equitable Trust Co. v. Christ, 47 Fed., 756, 757 (U. S. C. C., Mich., 1880).]

The question as to whether railroad cars, etc., are fixtures passing by a conveyance of the road will be found considered *ante*, p. *34, and will not be repeated here. See, also, Snedeker v. Warring, *ante*, p. *25; and the subject of constructive annexation considered *ante*, p. *33.

[In Hill v. Munday, 89 Ky., 36 (1889), ice in an ice house was held to pass with a hotel.]

[See Monti v. Barnes [1901], 1 K. B., 205, as to constructive annexation.]

[1] Wadleigh v. Janvrin, 41 N. H., 503 (1860), where it was *held*, that tie-up planks, stanchion-timbers, hinge-staples and tie-chains, temporarily disannexed and removed from a barn during the process of, and for con-

purpose, but permanent and without any intention of re-annexing them to *the realty, they do not pass by a convey- [*304] ance of the land.[2] According to the better opinion, where the severance is by the act of God, there being in such case no inten-

venience in repairing the barn, and only partially replaced at the time of the conveyance, remained parcel of the realty and passed with the land to the grantee; also, *held*, in the same case, that the trough, sweep, cast-iron nuts and other portion of the grinding part of a cider-mill, detached from the mill when not in use for the sake of storage-room, and at the time of the sale of the land lying about the cider-house in detached portions, passed as a part of the realty; McLaughlin v. Johnson, 46 Ill., 163 (1867), holding that rails laid in a fence, temporarily lent to the owner of an adjoining tract, on the sale of the land to which they belonged, to such borrower, pass to him with the land; Goodrich v. Jones, 2 Hill, 142 (1841). See, also, the note next preceding. [See, *ante*, p. *43, and Bacon v. Lewis, 33 Can. Law J., 680, 687 (Ont., 1897).]

[A steam-engine bolted to a stone foundation, is a part of the realty, although disconnected from the boiler and unused for two years, and which could be removed by unscrewing the nuts. Tolles v. Winton, 63 Conn., 440 (1893).]

[A sale of land embraces all timber unlawfully cut down, and lying upon the land at the time of the sale. Duff v. Bindley, 16 Fed., 178, 180 (U. S. Dist. Ct., Pa., 1883).]

[Trees cut upon land by a trespasser after the land has been seized by the sheriff, pass to the vendee of the land at sheriff's sale, even though removed therefrom, if capable of identification. Frank v. Magee, 49 La. Ann., 1250, 1254 (1897); 50 La. Ann., 1066, 1069 (1898).]

[2] Curry v. Schmidt, 54 Mo., 515 (1874). In this case hotel property was conveyed by deed of trust to secure a debt, and afterwards, on the destruction of the premises by fire, certain fixtures were during the progress of the fire detached therefrom and carried to another lot for safety; some time afterwards the trustee sold the real estate under the trust to the plaintiff for more than the amount of the debt, who brought replevin for the fixtures. *Held*, that in the condition the premises were in when sold, such fixtures formed no part of the realty and did not pass simply by the sale of the ruined premises. Adams, J.: "The question here is not, whether the trustee, or beneficiaries in the trust, could have reached the fixtures thus detached, if necessary for the payment of the debts; but whether the title to the fixtures passed simply by a sale of the ruined premises. There is nothing in the case to show that such was the intention of the parties. In my judgment, the trustee could have sold the fixtures as personal property; but he had no right to sell them merely by selling the ruined premises." See, also, O'Dougherty v. Felt, 65 Barb., 220 (1866). [See, *ante*, p. *46. Brule v. Dostaler, 26 Rap. Jud. Rev., 619 (Que., 1874).]

[Where the purchaser of stones from the owner of the soil, removes them from the walls and fields, but piles them upon the same farm, they

[*305] tion to sever on *the part of the owner of the freehold, the thing severed does not lose its character as realty by such severance, and hence passes by a conveyance of the land.[3]

With reference to the case of manure made upon a farm in the ordinary course of husbandry and which is upon the premises at the time of the sale and conveyance of the land, there has been some difference of opinion as to when it passes with

do not pass to a grantee of the farm. Fulton v. Norton, 64 Me., 410 (1875).]

[Where all that portion of a fence possessing any value is moved, the part left being old and rotten rails, the latter ceases to be a fence or a part of the realty. Fullington v. Goodwin, 57 Vt., 641, 642 (1885).]

[3] Rogers v. Gilinger, 30 Penn. St., 185 (1858). In this case the fragments of a large frame building demolished by a tempest, leaving the foundation and floors nearly entire, but breaking the superstructure so that its materials could not be replaced or used in the construction of a similar building, were *held* to pass as a part of the realty by a sheriff's sale on a judgment which was a lien on the premises prior to a demolition of the building. The rule of decision was thus laid down by Strong, J.: "The true rule would rather seem to be, that which was real shall continue real until the owner of the freehold shall by his election give it a different character." Herlakenden's Case, 4 Co., 62 a (1589); Bowles's Case, 11 Co., 81 b (1615), were cited as authorities for the decision. In rendering his opinion in said cause, Strong, J., further said: "The act of God, it is said, shall prejudice no one; 4 Co., 86 b; yet the maxim is not true if a tempest be permitted to take away the security of a lien creditor, and transfer that which was his to the debtor or the debtor's assignees. If trees are prostrated '*per vim venti*,' they belong to the owner of the inheritance, not to the lessee; Herlakenden's Case, *ut supra*. He takes them as a part of the realty. True, he may elect to consider them as personalty, and this he does when he brings trover for their conversion; but until such election they belong to him as parcel of the inheritance. If a tenant hold 'without impeachment of waste,' the property in the timber is in him; but if there be no such clause in his lease, and he remove from the land trees blown down, such removal is waste. That could not be, however, unless notwithstanding the severance, they continue part of the realty, for waste is an injury to realty. I am aware that it is said to have been held that if an apple-tree be blown down, and the tenant *cut* it it is no waste; 2 Rolle Abr., 820. That may well be, for the falling of the tree is through the act of God, not of the tenant, and the *cutting* of the fallen timber is but an exercise of the tenant's right to estovers; but if he remove from the land *fallen* timber, it has been ruled to be waste." See, also, Bull. N. P., 33; Paget's Case, 5 Co., 76 b (1593-4); Goddard v. Bolster, 6 Me., 427 (1830).

However, in Buckout v. Swift, 27 Cal., 433 (1865), the rule is laid down

*the land. It seems very clear that, if spread upon the [*306] land or incorporated with the soil, it passes by a conveyance thereof as parcel of the soil. And the weight of authority seems firmly to establish the rule that such manure, whether lying scattered about or in heaps in the barn-yard, or in heaps at the stable windows, in the state in which it usually accumulates, is part of the freehold, and passes by a conveyance thereof,[1] unless reserved in the deed.[2]

that the severance and removal of a house from the freehold, changes the character of the house from real to personal property whether the severance is by the act of God or the act of man; and it was accordingly *held* that such severance and removal from the lot by a flood withdrew the house from the operation of the mortgage lien; and after the removal the mortgagor might sell the house and the purchaser convert it to his own use.

[Brick, being debris of a burned building, and left upon the land, pass to the grantee. Guernsey v. Phinizy, 113 Ga., 898, 900 (1901).]

[A distillery was consumed by fire, leaving an engine, boiler and the machinery disconnected upon the ground, and useless except as old iron. The owner removed the boiler, and sold the land to one buying for the purpose of excavating for sand, and then building thereon. *Held,* that because the articles had once been fixtures, their ruins did not necessarily remain such; and that all of the facts indicated an intent on the part of the grantor and of the grantee that the old iron was not to pass with the land. Triplett v. Mays, 13 Ky. L. R., 874 (Super. Ct., 1892).]

[In Leidy v. Proctor, 97 Pa. St., 486, 492 (1881), it was held that fallen timber passes to the grantee; but in Jenkins v. Lykes, 19 Fla., 148, 158 (1882), it was held that a conveyance of land does not carry fallen timber previously purchased by another, nor trees felled. See, *ante,* p. *246, and p. *43.]

[1] Parsons v. Camp, 11 Conn., 525 (1836); Plumer v. Plumer, 30 N. H., 558 (1855); Kittredge v. Woods, 3 N. H., 503 (1826); Stone v. Proctor, 2 D. Chip., 108 (1824); Goodrich v. Jones, 2 Hill, 142 (1841); Wetherbee v. Ellison, 19 Vt., 379 (1847), where it was held to pass though piled up in the stables till removed from the farm. [Vehue v. Mosher, 76 Me., 469 (1884); Norton v. Craig, 68 Me., 275, 276 (1878); Elting v. Palen, 14 N. Y. Supp., 607 (1891).]

[Manure made upon a farm, in the ordinary course of husbandry, goes to the mortgagee as against one having purchased, after condition broken, with knowledge that the mortgagee had forbidden its removal. Chase v. Wingate, 68 Me., 204, 207 (1878).]

[Where a sale was made of less than an acre of land, being a part of a farm, manure made upon the farm, which happened to be piled upon the lot conveyed, did not form a part of the land. Collier v. Jenks, 19 R. I., 137, 138 (1895).]

[Where, in performance of his contract of sale, a landowner scrapes up

But where the manure is not made in the ordinary course of husbandry the case may be different. Thus, by the conveyance of a house and stable with a small piece of land used as a back yard, but not cultivated, manure in the stable cellar on the ground, but not incorporated with the soil, made by the horses of the grantor who was a teamster, does not pass.[3] So, if a lessor during the continuance of the tenancy, sells and conveys [*307] *land, on which is situated manure made from the materials of the tenant under such circumstances that as against the landlord he has a right to remove it, to a third person having notice of the tenant's rights, but without reserving the manure, such purchaser cannot hold the manure.[4] But the intention of the defendant, by keeping in the stables where made, the manure made by his animals from crops raised on the farm while a tenant, to remove the same from the farm without throwing it

the manure in his barn-yard, and places it in a large heap upon an adjoining field ready for removal by the buyer, this is a sufficient severance and delivery so that it will not pass to a subsequent grantee of the farm without notice. French v. Freeman, 43 Vt., 93 (1870).]

The opposing case of Ruckman v. Outwater, 28 N. J. Law, 581 (1860), holding, that where land is conveyed by deed without any clause of reservation, manure lying in and around the barn-yard does not pass to the grantee, seems contrary to the clear weight of authority.

["Manure laid upon lands may pass under a conveyance of the lands, but that is not under the law of fixtures." Blancke v. Rogers, 26 N. J. Eq., 563, 568 (1875). And in Chase v. Wingate, 68 Me., 204 (1878), it holds that in general, manure, made in the course of husbandry upon a farm, is so attached to and connected with the realty that it passes as appurtenant. This doctrine rests upon the ground that it is for the interest of good husbandry and the encouragement of agriculture, that manure produced upon a farm should be consumed upon it, and that the farm should not be impoverished by the removal therefrom of the material necessary for its enrichment and growth of succeeding crops. Chase v. Wingate, 68 Me., 204 (1878).]

[2] See Plumer v. Plumer, and the other cases cited in the next note (*supra*); also Proctor v. Gilson, 49 N. H., 62 (1869).

[3] Proctor v. Gilson, 49 N. H., 62 (1869). See, also, Farrar v. Smith, 64 Me., 74 (1873). See the subject further considered (*ante*, p. *122), under the head Landlord and Tenant.

[4] Corey v. Bishop, 48 N. H., 146 (1868).

[A tenant, after the tenancy has expired, is entitled to manure, where the grantee had notice; and the tenant is not estopped because he assisted in making the sale. Snow v. Perkins, 60 N. H., 493 (1881).]

on plaintiff's land, supposing that as between the defendant and the grantor of the plaintiff he had a right to remove it, in the absence of any notice of this right either actual or constructive to plaintiff, the grantee of the land, cannot affect plaintiff's right to the manure, unless such intention was manifested by some act sufficient to put plaintiff upon inquiry at the time of his purchase.[5]

II. The Question as Affected by the Words of the Grant, Contract, etc.

As has been already observed,[6] as between grantor and grantee, and mortgagor and mortgagee, etc., the effort of a court is always to ascertain and give effect to the intent[7] of the parties, if it can be done consistently with established rules of law; and, if the language used affords evidence that an article is intended to pass, it will pass, whether a mere chattel, or one which by annexation has become parcel of the realty. The question in such a case becomes one of interpretation and construction, determinable by the general rules applicable in such cases.[8] A custom in the trade, to consider certain articles annexed to the land, as not being fixtures, will not be allowed in evidence to alter the meaning of the words in a deed, those *words being that the mill should be assigned with all [*308] its machinery fixed and movable.[9]

[5] Wetherbee v. Ellison, 19 Vt., 379 (1847).

[Where a husband carried on his wife's farm for his and her support, without any agreement, in the same manner as if his own, manure accumulated thereon, although increased by the husband's stock, and hay brought upon the place, is a part of the land as between husband and wife; and, after conveyance by her, he becomes a licensee, and is liable to the grantee if he removes the manure. Norton v. Craig, 68 Me., 275 (1878).]

[6] *Ante*, p. *274.

[7] See *Ex parte* Bentley, 2 M. D. & DeG., 591 (1842); s. c., 6 Jur., 719; *Ex parte* Lloyd, 3 Dea. & Ch., 765 (1834); s. c., 1 Mont. & Ayr., 494. [See Johnston v. Morrow, 60 Mo., 339, 342 (1875) Atlantic Trust Co. v. Atlantic City Laundry Co., 64 N. J. Eq., 140, 145 (1902).]

[8] See those rules well collected in Blackwell on Tax Titles, 595, *et seq.*

[9] Boyd v. Shorrock, L. R., 5 Eq., 72 (1867); 37 L. J., Chanc., 144; 17 L. T. (N. S.), 197; 16 W. R., 102. See, also, Christian v. Dripps, 28 Penn. St., 271 (1857), where it was *held* that the rule of law as to fixtures necessary to a manufactory being a part of the freehold cannot be evaded by

The question may arise from the use of the terms, "fixtures," "fixed furniture," etc., which have already been alluded to in a preceding chapter;[10] by the use of some general term to designate the building conveyed, instead simply of conveying the land by metes and bounds, and in many other different ways.

Where the conveyance is of a factory or mill, etc., *eo nomine*,[11] with the privileges and appurtenances, if the article in question is an essential part of the mill or factory, it is included in that term and passes therewith,[12] whether real or personal

proof of a contrary custom. [Williams's App., 1 Monaghan, 274 (Pa., 1889). See Ward v. Kilpatrick, 85 N. Y., 413, 417 (1881); Nisbet v. Mitchell-Innes (1880), 17 Scot. Law Rep., 438, 439.]

[A custom can not control the effect of a deed between grantor and grantee. "What would pass by the deed as part of the realty could only be excepted by express reservation; and such reservation would have to be made in every deed, for no number of reservations in deeds would establish a custom." Thomas v. Davis, 76 Mo., 72, 79 (1882).]

[10] *Ante*, pp. *7, *166.

[11] But a conveyance by the number of the lot adding "on which is erected a woolen manufactory," is descriptive of the realty only. Teaff v. Hewitt, 1 Ohio St., 536 (1853).

[12] See Farrar v. Stackpole, 6 Me., 154 (1829); Lathrop v. Blake, 23 N. H., 46, 65 (1851); Teaff v. Hewitt, 1 Ohio St., 536 (1853); Hancock v. Jordan, 7 Ala., 448 (1845); McCluney v. Lemon, Hayes, 154 (1831); Potts v. N. J. Arms Co., 17 N. J. Eq., 404 (1866); Voorhis v. Freeman, 2 W. & S., 116 (1841); Hoskin v. Woodward, 45 Penn. St., 42 (1863); Baldwin v. Walker, 21 Conn., 168 (1851). [Cook v. Condon, 6 Kan. App., 574, 583 (1897); Delaware, L. & W. R. R. Co. v. Oxford Iron Co., 36 N. J. Eq., 452, 455 (1883); Baker v. Atherton, 15 Pa. Co., 471, 473 (1894); Patton v. Moore, 16 W. Va., 428, 437 (1880); Great Western R'y Co. v. Bain, 15 Up. Can. C. P., 207, 228 (1865); Crawford v. Findlay, 18 Gr. Ch., 51, 54 (Ont., 1871); see, also, Canada Loan Co. v. Traders Bank, 29 Ont., 479 (1898); "brewery." Reyman v. Henderson Nat. Bank, 17 Ky. L. R., 1291, 1292 (1896); "foundry." New Orleans Banking Co. v. Leeds, 49 La. Ann., 123 (1897).]

[A mortgage of the "National Glass Works" included the buildings and ground upon which they were erected, and which was necessary to their use and operation, and all machinery and apparatus which was of a permanent character and essential to the purposes of the business. Morotock Ins. Co. v. Rodefer, 92 Va., 747, 753 (1896).]

[A "bakery" includes an oven and all fixtures belonging thereto and forming a part thereof. Neib v. Hinderer, 42 Mich., 451, 454 (1880).]

[The sale of a "plantation" includes fences, as they give land the

status of a plantation. Bagley v. Rose Hill Sugar Co., 111 La., 249 (1903).]

[A levy upon a "saw-mill" covers the saw with appurtenances and machinery which make the property what it is denominated. Newhall v. Kinney, 56 Vt., 591 (1884).]

[Where the contest was between a mortgagee of land with "a planing mill," and a mortgagee of personal property, the fact that the machinery was not specified in either instrument was held to confirm the conclusion that it was covered by the former mortgage. Shelton v. Ficklin, 32 Gratt., 727, 737 (Va., 1880).]

[A machine, in a qualified sense, may be said to be a part of the building, but it is more accurate to speak of it as an appurtenance. Haslett v. Gillespie, 95 Pa. St., 371, 376 (1880).]

[Insurance upon a "mill-building" includes the machinery which makes and constitutes it a mill. Brugger v. State Ins. Co., 5 Sawy., 304 (U. S. C. C., Ore., 1879); so, as to a "starch manufactory." Peoria Fire Ins. Co. v. Lewis, 18 Ill., 553 (1857); so, as to a steam saw-mill. Bigler v. New York Central Ins. Co., 20 Barb., 635 (N. Y., 1855); so, as to a "grist-mill," especially where the value of the building alone is only one-third of the indemnity named; and where the insured, unknown to the insurer, also held a policy upon his "fixed machinery" it created double insurance avoiding the policy which required consent for additional insurance to be given in writing by the insurer. Shannon v. Gore Ins. Co., 2 Up. Can. App., 396 (1878).]

A sheriff's sale upon execution against the owner of iron works, by virtue of which, levy was made upon several tracts of land "with all and singular the buildings, furnaces and other improvements thereon, known as the Shawnee Iron Works," passes to the vendee a railroad used in connection with the furnaces and extending therefrom across intermediate lots of other owners over which the company had a right of way to river lots of the company, where coal and ore were usually landed for the use of the furnaces, both extremities of the railroad being situated upon the land levied upon; and this though the word "appurtenances" was omitted from the levy. Wright v. Chestnut Hill Iron Ore Co., 45 Penn. St., 475 (1863). See, also, as to the word "appurtenances," *Ex parte* Bentley, 2 M. D. & DeG., 591 (1842).

[A mortgage of the land of a street railway company, together with the poles, rails and wires, covers the track and lines of an electric railway upon the city streets. Kirkpatrick v. Cornwall Street R'y Co., 2 Ont. Law, 113 (App., 1901).]

[A sheriff's deed of a block "together with all the buildings, fixtures, machinery and other appurtenances thereunto belonging and thereon situate," does not cover a pumping station situated upon another tract belonging to strangers, and connected by iron pipes with a sugar-mill upon the tract conveyed, and necessary to supply the mill with water, the pumping station being also used to supply the city with water. The appurte-

property.[13] Thus in Farrar v. Stackpole, which was the conveyance of a saw mill.

[*309] *With reference to the use in the instrument of the words "fixtures," "things fixed to the freehold," "fixed machinery," etc., as has been already observed, no general rule can be laid down, and each case must be determined by the general rules of interpretation and construction.[14]

nances were restricted by the deed to those embraced within the block conveyed. Keystone Iron Co. v. Wilkie, 6 Kan. App., 654 (1897).]

[A lease of the "Bell House" upon lots described "with all the appurtenances" did not cover an iron kettle in an iron arch on other lots across an alley, which the lessee had used for heating water to clean the hotel. Barrett v. Bell, 82 Mo., 110 (1884).]

[13] Farrar v. Stackpole; Teaff v. Hewitt (*supra*). [Delaware, L. & W. R. R. Co. v. Oxford Iron Co., 36 N. J. Eq., 452 (1883); see, also, Wood v. Whelen, 93 Ill., 153, 169 (1879).]

[A mortgage, by a corporation chartered for the purpose of erecting an opera-house, of a lot upon which such opera-house is being erected, "and all the buildings and improvements thereon, or to be erected thereon," covers all of the furniture, fixtures, furnishings, and paraphernalia necessary to make it a complete opera-house. Grosvenor v. Bethell, 93 Tenn., 577, 586 (1894).]

[In directing a sale to satisfy a lien, a "mill" comprehends all engines, boilers, machinery, tools, etc., but not buildings, nor vehicles, draft animals, etc. Empire Lumber Co. v. Kiser, 91 Ga., 643, 650 (1893).]

See, however, Hutchinson v. Kay, 23 Beav., 413 (1857); s. c., 3 Jur. (N. S.), 652; 26 L. J. Ch., 457; 5 W. R., 341, where it was *held*, that looms in a factory, not fixed, but merely steadied by having their legs set into iron cups dropped into holes in the pavement, did not pass by a mortgage of the mill or factory, with the rights, members and appurtenances thereunto belonging, "together with the steam-engines, boilers, shafting, piping, mill-gearing, gasometers, gas-pipes, drums, wheels, and all and singular other the machinery, fixtures and effects fixed up in or attached or belonging to the said mill," etc.; nor by a sale of the mill "together with the weaving-shed, steam-engine, boiler, etc., and other machinery and fixtures fixed up in and attached and belonging to the said mill," they not being fixtures in any proper sense of the term, and, though machinery, not machinery "belonging" to the mill, which was read by the court as "belonging essentially to the mill."

["Appurtenances" as used in conveyances passes nothing which is not a part of the realty, and can not embrace personal property. Ottumwa Mill Co. v. Hawley, 44 Iowa, 57, 60 (1876).]

[14] See *ante*, chap. 1, p. *7, and note.

Where a prior mortgage described the property as "all of the stock of goods and merchandise now in the store," and in a subsequent mortgage it

was described as "all of the stock of goods and merchandise now in the store, and fixtures," both mortgages being drawn by the same person, *held*, that the former mortgage did not include the fixtures. *In re* Eldridge, 4 Nat. Bank Reg., 498 (1870); s. c., 2 Bissell, 362.

[Where the word "furniture" is interlined after "fixtures" in a mortgage, it is evident that they were not intended to have the same meaning; otherwise the addition would be superfluous. Fore v. Hibbard, 63 Ala., 410, 412 (1879).]

The words "fixtures belonging to the fulling-mill and carding-machine," in a contract (written by one not a lawyer) for the sale of a farm, "together with all the fixtures belonging to the fulling-mill and carding-machine, together with every article attached to the freehold," it being shown by extrinsic evidence that the words "fulling-mill and carding-machine" were used to designate the building in which the carding-machine in question and the fulling-mill had been situated and used, and that the former had been prior to the contract removed and stored in the grist-mill on the farm without its place being supplied, were construed as meaning not only the building, but also the carding-machine itself, and other machinery that had been used in the carding-machine and fulling-mill building and belonging there when in place. Martin v. Cope, 28 N. Y., 180 (1863); s. c., 3 Abb. Ct. App. Dec., 182.

A mortgage of a silk-mill with all the steam-engines, boilers, steam-pipes, main shafting, mill-gearing, mill-wright's work and other machinery and fixtures whatsoever being or which should thereafter be on the land described in the mortgage was *held*, as against a second mortgagee not to be confined to machinery necessary for giving power to the mill as being *ejusdem generis* with the specified particulars, but to include silk-spinning-machines attached to the floor simply by their own weight, but by bolts and nuts and iron rods fixed to the mill-beams overhead. Haley v. Hammersley, 3 DeG. F. & J., 587 (1861); s. c., 30 L. J., Ch., 771; 4 L. T. (N. S.), 269; 7 Jur. (N. S.), 765; 9 W. R., 562.

[Where property insured was a "building, including gas, steam and water-pipes, and all other permanent fixtures contained therein," *held*, not to include counters, shelving and office fixtures. The words "all other permanent fixtures" are used in connection with such fixtures as gas, steam and water-pipes; and store fixtures are not of the same class. Banyer v. Albany Ins. Co., 85 App. Div., 122 (N. Y., 1903).]

[A mortgage, after describing the land mortgaged, had the following clause: "And all personal and mixed estate of which the said party of the first part is seized or possessed, and also all machinery, boilers, engines and fixtures of every description." Said Bird, V. C., in delivering the opinion of the court: "This clause seems to disconnect the personal property from the machinery. It also seems to include machinery as fixtures. The inference is not so strong as it would have been had the word 'fixtures' been preceded by the word 'other,' but, nevertheless, a distinction between the personal and fixed property is clearly drawn; and the association of the word 'machinery' with boilers, engines and fixtures leads

strongly to the conclusion that the machinery was regarded as an accession to the realty.'' Atlantic Trust Co. v. Atlantic City Laundry Co., 64 N. J. Eq., 140, 145 (1902).]

[A mortgage of lands and buildings and machinery, which enumerates the machinery, some of which is undeniably a part of the freehold, and the rest not necessarily chattels, and the indebtedness is secured upon the whole property without division, does not necessarily make the machines chattels although the property is referred to as ''lands and chattels.'' Robinson v. Cook, 6 Ont., 590, 597 (1884).]

A. by deed of mortgage granted, bargained, etc., to B. (in his possession then being by a previous bargain and sale) an iron foundry and two dwelling-houses, etc., and the appurtenances thereunto belonging ''*together with all grates, boilers, belts and other fixtures* in and about *the said two dwelling-houses* and the brew-houses thereto belonging;'' and all houses, cottages, edifices, buildings, commons, etc., liberties, privileges, easements, advantages, etc., to the said foundry, messuages, and lands appertaining. *Held*, that the maxim *expressio unius est exclusio alterius* applied, and that cranes, presses, steam-engine and other fixtures in the foundry used for the purpose of the business there carried on and valued at 600*l.* did not pass, though they would have passed had not the others been enumerated. Hare v. Horton, 5 B. & Ad., 715 (1833). [*Re* Eureka Mower Co., 93 Supr. Ct. (86 Hun), 309, 315 (N. Y., 1895).]

[An enumeration of certain appurtenances and improvements will exclude others, except so far as, by the terms of the list itself, particular articles can be made to be included; and it can be established by parol that certain other articles were necessary and proper to give completeness to one enumerated; but it would not be legitimate to extend the expression ''et cetera'' beyond the class of articles in special connection with which it was used. Bagley v. Rose Hill Sugar Co., 111 La., 249 (1903).]

[Where a mortgage, in enumerating the property embraced, described lands, and ''also'' machinery, it is inferred that it does not cover machinery of the same kind not specified. Choate v. Kimball, 56 Ark., 55, 62 (1892).]

[Where a grantor of a hotel reserves the carpets, furniture, and pictures of the upper rooms, by implication gas-fixtures and screens pass by the deed. Fratt v. Whittier, 58 Cal., 126, 133 (1881).]

[Where, immediately after a sale of a flouring-mill, a question having arisen between the parties as to whether certain articles were included, it was agreed that they should be put up for sale, which was done. *Held*, that the jury had a right to infer that other articles, not claimed by the vendor as not being embraced by the sale of the mill, were intended to be sold as a part of it. Elizabethtown Coal Co. v. Elizabethtown Milling Co., 13 Ky. L. R., 96 (Super., 1891).]

[Where a grantor of a house took back a mortgage for the purchase price, and also gave a schedule of the personalty in the house which formed a part of the contract of sale, the mortgage covered hand-painted canvases or tapestries firmly cemented to the ceilings, which were not mentioned in

the schedule, as the mortgage covered all that was granted; and the tapestries not appearing in the schedule, showed that they were intended to be a part of the realty. Cahn v. Hewsey, 29 N. Y. Supp., 1107 (1894).]

[A deed conveyed certain lots with the buildings thereon, and certain machinery enumerated, and personal property, and reserved to the grantor "the right to remove from said premises all property not hereby specially conveyed." *Held,* that the grantor could remove all trade fixtures not specified, including shafting not used to distribute power to the machines enumerated. Kirch v. Davies, 55 Wis., 287, 296 (1882).]

[A mortgage of premises "together with all and singular the water-wheels and flumes, outhouses, buildings, ways, waters, water-courses, privileges, profits, hereditaments and appurtenances whatsoever to the said land and premises belonging" will not cover mill machinery although ordinarily it would be covered by the mortgage, as the mortgagee has taken security on a certain kind of the machinery fixtures only. Great Western R'y Co. v. Bain, 15 Up. Can. C. P., 207, 227 (1865).]

[A mortgage was made of the plant of a glass company "with all improvements, extensions, enlargements, and additions thereto now or hereafter to be owned, constructed or acquired by said company, and all the appurtenances, machinery and appliances, piers, wharves, tanks, pipes, boilers, sheds, boiler houses and structures of every kind and description now erected and constructed, or hereafter to be erected and constructed on said lots or either of them. And also all the property real, personal and mixed of the said Maryland Glass Company now owned by said company, or hereafter acquired by it, together with all improvements thereon, and all rights and appurtenances appertaining thereto." *Held,* to exclude merchandise manufactured for sale, and to include only the personal property in some way appurtenant to the fixed structures. As the instrument had been very carefully drawn, it would have specified the glassware if that had been the intention. Mallory v. Maryland Glass Co., 131 Fed., 111 (U. S. C. C., Md., 1904).]

[Where a factory is advertised for sale, the mention of certain immovables therein is not a reservation by the vendor of the immovables not referred to; such reservation should have been expressed. Maginnis v. Union Oil Co., 47 La. Ann., 1489, 1497 (1895).]

[Where a conveyance was made of a lot of land "together with all the trees, shrubbery, fences, fountain, basin and pipes connected therewith, now upon said lot; also all steam-heating apparatus and its connections; all chandeliers, all gas and water fixtures, all window shades and fixtures, and all window screens now contained in the house," the grantor contended that the enumeration of certain articles indicated an intent that a grate, etc., should not pass. But Devens, J., in giving the opinion of the court, said: "In applying the well-known maxim, *expressio unius est exclusio alterius,* the object of the enumeration is to be considered. So far as the inside of the house is concerned, the object was apparently to include things which were mere articles of furniture, and which would not pass by a grant of the realty, like chandeliers, gas fixtures, window shades and

screens, and also steam-heating apparatus and its connections, part of which latter might be contended, as it has been here contended, to be personal property. From such an enumeration we do not think it can be inferred that other articles, which as between grantor and grantee, might be treated as a part of the realty should be held otherwise.'' Leonard v. Stickney, 131 Mass., 541, 543 (1881). This case was distinguished from Haro v. Horton, *supra*.]

[An exception of ''all plants in the fernery, greenhouses, and forcing-houses,'' which are movables, does not entitle a grantee to other plants, not enumerated, which are not *partes soli*. Nisbet v. Mitchell-Innes (1880), 17 Scot. Law Rep., 438.]

[That a mortgage covered real estate and ''all engines, machines, tools, appliances, connections, attachments, and contrivances of every kind now used in operating the glass factory on said premises,'' is no evidence that the articles described are not a part of the realty. Morotock Ins. Co. v. Rodefer, 92 Va., 747, 753 (1896).]

[Where a mortgage of a leasehold enumerated certain articles, this does not exclude fixtures not enumerated, especially where the articles not enumerated are an essential part of the security. Southport Banking Co. v. Thompson (1887), 37 Ch. D., 64.]

In Alvord Carriage Man'f'g Co. v. Gleason, 36 Conn., 86 (1869), a blower-pipe conveying air from a blower to a forge, both permanently located in their places, and without which the blower would be useless, was regarded as part of the blower and passing under the description of ''fixed machinery'' in a conveyance.

[The word ''fixtures'' may mean a chattel which is a part of another chattel where the parties have so used the word. Thus, where a chattel mortgage was given of an elevator ''and all the fixtures thereto belonging,'' the word ''fixtures'' is construed to cover such articles as would pass under a mortgage of the elevator if it had been realty. McGorrisk v. Dwyer, 78 Iowa, 279, 281 (1889).]

In Metropolitan Counties, etc., Society v. Brown, 26 Beav., 454 (1859); s. c., 5 Jur. (N. S.), 378; 28 L. J., Ch., 581; 7 W. R., 303, B. mortgaged iron-works and rolling-mill with the machinery, etc., specified in a schedule ''and all engines, machinery, fixtures and things which might thereafter be fixed and fastened in or upon the same premises whether in addition to or substitution of the several fixtures, machinery, articles and things specified in the said schedule.'' *Held*, that the words ''fixed and fastened'' must according to the true construction of the deed (using the word ''fixed'' in the same way as Wood, V. C., did in Mather v. Fraser, *supra*), be considered as governing the whole sentence; and therefore that subsequent additions consisting of an engine for turning a lathe, a steam-hammer and anvil, the hammer fastened by screws upon a stone foundation, a boiler secured in brick-work, and a furnace laid upon a brick foundation, passed to the mortgagee. The anvil passed with the hammer though not fixed as it formed an essential part of the machine which would be incomplete without it. But cutters and the bed-plate not fastened to the ground at all by

any process, though the bed-plate was very heavy, straightening-plate and metal flooring of the mill, quite loose, did not pass.

[A mortgage of "all the plant and machinery in use in the factory" does not cover patterns never in actual use in the factory and not even in the factory at the time the mortgage was made. McCosh v. Barton, 2 Ont. Law, 77 (App., 1901), reversing 1 Ont. Law, 229 (1901).]

[A debtor gave to his creditor a mortgage of land, describing it, "with the factory buildings standing thereon, with the water-wheel, shafting, belting, machinery, tools and fixtures, contained in said buildings." A surety for the debt, when sued, contended that he was partially discharged from liability, because the creditor did not record the mortgage as a mortgage of personal property, as well as a real estate mortgage, which neglect resulted in some of the property covered by the mortgage being taken by a subsequent chattel mortgagee, and the surety's right of subrogation thereto was lost. Lord, J., in delivering the opinion of the court, said: "There is no word used in this description which may not of itself, taken alone, describe personal estate. But in the connection in which used, it would be scarcely less than absurd to say that the word 'buildings' was a description of personal chattels; and the same is true of the word 'fixtures,' which are the first and last words used in the description of articles claimed to be personal property. Some of the other words used may, in their ordinary signification when standing alone, be descriptive of personal property; but it would be an extraordinary use of language to speak of a 'factory building with the water-wheel' as personal property. 'Shafting,' possibly, and 'belting,' 'machinery,' and 'tools,' if used without reference to their position, might convey the idea that they were chattels; but while, taken independently, and without any reference to their situation, they might be deemed chattels, yet every one of the words is a word which may properly be used to signify a part of the realty. * * * * We are satisfied that the parties intended to convey, and did convey, only such articles as were a part of, or attached to, the realty, and which, from their situation and use, would be deemed to be, as between grantor and grantee, connected with the realty. We have no doubt that 'shafting,' 'belting,' 'machinery,' and 'tools' can be so attached to, and be a part of the realty, when, by the connection in which they are used, such is shown to be the purpose and intention of the parties. We have no description of the articles named, nor how they were connected with, or attached to the realty; and, in the absence of all evidence upon that subject, and taking into view the instrument in which they are used, and the manner in which they are introduced into that instrument, we think that the whole instrument, taken together, is simply a conveyance of real estate with all such fixtures as, between grantor and grantee, might pass as parcel of the realty; that it neither conveys nor purports to convey, any of the instruments which are used by the hand, and which are not in any sense connected with the realty. * * * * There was, therefore, no negligence on the part of the plaintiff." Allen v. Woodard, 125 Mass., 400 (1878).]

[A chattel mortgage of an elevator placed upon land leased from a

[*310] *Assuming the correctness of the rule, that, if a man assigns his mill or manufactory and all its appurtenances, the fixtures pass, it is also clear that the deed may express that they shall not pass. Words may be inserted of any description to ex- [*311] clude *them, or they may be the subject of distinct contract; and, if the court sees plainly that by a conveyance of freehold property, or an assignment of leasehold property, as it may be, it was not intended to include the fixtures, then the freehold or leasehold property may be the subject of one contract and the fixtures the subject of another.[1]

railroad company, covers a track-scale as "fixtures," where the scale was annexed to and used in connection with the elevator, although such scale was not upon the leased land, but upon the land of the railroad company under a license, the contest being between the purchaser at the mortgagee's sale, and creditors of the mortgagor, the railroad company making no claim. McGorrisk v. Dwyer, 78 Iowa, 279 (1889).]

See, also, Beck v. Rebow, 1 P. Wm., 94 (1706), *ante*, p. *299, note; Mather v. Fraser, 2 K. & J., 536 (1856); s. c., 2 Jur. (N. S.), 900. [Hathaway v. Orien Ins. Co., 11 N. Y. Supp., 413, 415 (1890); see Bemis v. First Nat. Bank, 63 Ark., 625, 631 (1897).]

1 Waterfall v. Penistone, 6 Ell. & Bl., 876 (1856); Begbie v. Fenwick, L. R., 8 Ch. App., 1075, note (1866); s. c., 24 L. T. (N. S.), 58; 25 L. T. (N. S.), 441; Fortman v. Goepper, 14 Ohio St., 558 (1863); Folsom v. Moore, 19 Me., 252 (1841). [Richards v. Gilbert, 116 Ga., 382, 385 (1902); Tyson v. Post, 22 N. Y. Wkly. Dig., 492 (Supr. Ct., 1885), aff'd 108 N. Y., 217.]

It was accordingly *held* in Begbie v. Fenwick, where S. by way of mortgage demised to B. all and singular the premises comprised in certain indentures of lease therein specified for the unexpired residue of the respective terms except the last ten days respectively, and by the second operative part assigned all steam-engines, boilers, machinery, plant and fixtures, etc., upon the premises and not being in the nature of landlord's fixtures, the proviso of redemption applying to both operative parts, that the trade fixtures did not pass by the first witnessing part, but by an entirely separate contract and assignment, viz., the second operative part, and B. not having registered his security as a bill of sale within the Bills of Sale Act, it was void as against a subsequent mortgagee, F., whose security had been registered. See, also, Quinby v. Manhattan Cloth & Paper Co., 24 N. J. Eq., 260 (1873); Hawtry v. Butlin, L. R., 8 Q. B., 290 (1873); *Ex parte* Daglish, L. R., 8 Ch. App., 1072 (1873), and the cases therein cited; also Bills of Sale Act *post*.

[Where a mortgage of real estate, after describing it by metes and bounds, contains a clause mortgaging the machinery thereon specifically enumerating the same, and stipulating that it should not be removed, it

makes the machinery, as between the parties, personal property. Binkley v. Forkner, 117 Ind., 176, 186 (1888).]

[Where a mortgage covered a lot "together with all the machinery, &c.," naming certain articles, it indicates that the machinery was to pass as personal property. Padgett v. Cleveland, 33 S. C., 339, 347 (1889).]

In Fortman v. Goepper, F., in selling his brewery to H. & B., conveyed the real estate by metes and bounds, the consideration stated being $16,000, and by bill of sale at the same time sold and transferred among other things the articles in controversy for $9,000, and took back a real estate mortgage, describing the premises as in the deed, to secure unpaid purchase money. H. and B. subsequently executed a chattel mortgage on the property included in the bill of sale. *Held*, that the deed, bill of sale and mortgage having been executed at the same time and as parts of one transaction, each must be held to have been designed by the parties to perform its appropriate office in consummating the sale, that, therefore, the real estate mortgage covered no more property than was included in the deed, and the property in question in the bill of sale as between F. and the mortgagees of B. was personalty. [See, *ante*, p. *45. Dewar v. Mallory, 26 Gr. Ch., 618 (Ont., 1879).]

[Where, at the time a sale of a brewery was made, the grantor taking a mortgage for unpaid purchase money, the grantor, in addition to a deed for the land, gave a bill of sale of the steam-engine, boiler, shafting and machinery therein in order that the grantee might remove it if desired, such articles are given the character of personal property, being personal in their nature, and it not appearing that any damage to them or to the realty will be occasioned by their removal. Zeller v. Adam, 30 N. J. Eq., 421 (1879).]

[Where a mortgagor of real estate gave a chattel mortgage upon the machinery therein, his testimony as to an intention to make such machinery a permanent part of the building will not overcome the presumption raised by the chattel mortgage; otherwise it would create a presumption that he intended to perpetuate a fraud upon the chattel mortgagee. Washington Nat. Bank v. Smith, 15 Wash., 160, 169 (1896).]

[Where a grantee gives a mortgage to secure part of the purchase money, the mortgage covers everything that passed by grant. Lavenson v. Standard Soap Co., 80 Cal., 245, 252 (1889); Langdon v. Buchanan, 62 N. H., 657, 659 (1883).]

[Where a mortgage is executed not only as a real estate mortgage, but also as a chattel mortgage, and does not refer to the property mortgaged as a "plant," but describes land as land, and personalty as personalty, and the mortgage is invalid as a chattel mortgage because not recorded, the mortgagee can maintain the lien of his mortgage on machines only by showing that they have become real estate. Knickerbocker Trust Co. v. Penn Cordage Co., 62 N. J. Eq., 624, 642 (1901).]

See, however, McRea v. Central Natn'l Bank, 50 How. Pr., 51 (1874), where, however, the bill of sale is stated by the court to have been "an after thought adopted * * * for greater caution." [McRea v. Cen-

tral Bank, 66 N. Y., 489, 500 (1876); see, also, Solomon v. Staiger, 65 N. J. Law, 617, 619 (1900); Best v. Hardy, 123 N. C., 226, 229 (1898). Likewise, giving a chattel mortgage upon fixtures for the purpose of insuring against a possible contingency that they might not be covered by the real estate mortgage, does not change their character. Studley v. Ann Arbor Bank, 112 Mich., 181, 185 (1897); Miles v. McNaughton, 111 Mich., 350, 354 (1896); McMillan v. Fish, 29 N. J. Eq., 610, 611 (1878); Fish v. N. Y. Paper Co., 29 N. J. Eq., 16, 20 (1878); Trowbridge v. Hayes, 45 N. Y. Supp., 635, 639 (1896); Cooper v. Harvey, 16 N. Y. Supp., 660, 663 (1891); Homestead Land Co. v. Becker, 96 Wis., 206, 212 (1897); Stevens v. Barfoot, 13 Up. Can. App., 366 (1886); Sun Assurance Co. v. Taylor, 9 Man., 89, 98 (1893).]

[Where, for greater caution, the proviso of a mortgage mentions the property as "lands and chattels," it does not prevent machines from passing as a part of the realty. Robinson v. Cook, 6 Ont., 590, 598 (1884).]

[A separate valuation upon a building and upon the machinery therein, in an insurance policy, is not an agreement that the machinery is not to be considered as real property. Havens v. Germania Ins. Co., 123 Mo., 403, 421 (1894).]

So, in Folsom v. Moore, the plaintiff having sold and the vendee having acquired a store as personalty by a title distinct from the realty, the plaintiff was not allowed his claim to it as realty by virtue of the foreclosure of his mortgage on the realty for unpaid purchase money.

[Where the three stockholders of a corporation enter into a private agreement, under which the corporation deeds the real estate to one, and he leases the same to the two others, with a provision that "the machinery in said building, and the machinery in the cracker ovens, belongs to the said lessees absolutely with full privilege of removal," such machinery becomes and remains personal property as between the lessor and all parties tracing title from the lessees. Keefe v. Furlong, 96 Wis., 219, 222 (1897).]

[The owner of chattels, by taking a subsequent mortgage of the land and the chattels, may affirm the sale of the chattel, and invest the landowner with the legal title thereto; yet it does not follow that they are thereby made a part of the realty, and subject to a homestead claim. Harkey v. Cain, 69 Tex., 146, 150 (1887).]

[Where a deed of trust covers land and certain articles described as personal property, and the trustee advertises that he will sell them separately, and so sells them, the purchaser of the realty can not claim the articles as a part thereof. Elliott v. Wright, 30 Mo. App., 217 (1888).]

[Where a sheriff sold land and a factory thereon separately, advertising the latter as personal property, a creditor, offering to redeem, is estopped from insisting that all of the property is real; for if the factory was real estate, the sale was invalid; if personal property, there can be no redemption; hence, an offer to redeem affirms the sale as real property. Horn v. Indianapolis Nat. Bank, 125 Ind., 381, 392 (1890).]

See, also, generally, Trappes v. Harter, 3 Tyrwh., 603 (1833); S. C., 2

*III. When Fixtures Pass by Devise or Bequest. [*312]

It may be stated as a general rule that by a devise of land the fixtures thereto annexed will pass with the land to the devisee, if there be nothing to indicate a contrary intention.[1] And the rule is the same whether annexed prior or subsequent to the date of the devise, or whether actually or constructively

Cr. & M., 153; 3 L. J. (N. S.), Exch., 241; and the cases of Minshall v. Lloyd, 2 M. & W., 450, 456 (1837); Wilde v. Waters, 16 C. B., 637, 647 (1855); Mather v. Fraser, 2 Kay & J., 536 (1856); Walmsley v. Milne, 7 C. B. (N. S.), 133, 134 (1859); Culwick v. Swindell, L. R., 3 Eq., 249 (1866); *Ex parte* Barclay, 5 DeG. M. & G., 413 (1855); *Ex parte* Bentley, 2 M. D. & DeG., 597 (1842), where Trappes v. Harter is doubted, and explained.

[1] *Ex parte* Reynal, 2 M. D. & DeG., 443, 461 (1841); Colegrave v. Dias Santos, 2 B. & C., 76, 80 (1823). See, also, Wood v. Gaynon, Ambl., 395 (1761); Johnston v. Dobie, Mor. Dict., 5443 (1783), cited *ante*, p. *304. [See Burdick v. Chesebrough, 94 App. Div., 532, 538 (N. Y., 1904). For the same rule as to emblements, see, *ante*, p. *255.]

[Mirrors fastened by an iron clamp to masonry, the frame resting upon mantels of a like design and of the same wood, pass as a part of the house; but otherwise as to a mirror resting upon a bracket and not connected in any other manner than pictures are. Lockwood v. Lockwood, 3 Redf., 330, 335 (N. Y. Surr., 1878).]

Where a testator after certain specific bequests gave the residue of his estate, both real and personal, to his executors in trust, and directed them to continue his manufacturing establishments in operation during the lives of certain beneficiaries, and distribute the income, and on the termination of such lives to sell the same and distribute the proceeds in execution of the trusts. *Held*, that the machinery in the factory which would otherwise have been regarded as personal assets under 2 Rev. Stat., 83, § 6 (providing that things annexed to the freehold or to any building for the purpose of trade or manufacture, and not fixed into the wall of a house so as to be essential to its support, are to be deemed assets, and go to the executor or administrator, as part of the personal estate), was converted into realty during the time it should be so used by the executors in the building, and could not be applied to the payment of debts other than those connected with the factories, until after the specific legacies had been exhausted. Downing v. Marshall, 1 Abb. Ct. App. Dec., 525 (1863).

[A devise of a permanent building carries the land under it and necessary for its use. Richmond v. State, 5 Ind., 334, 337 (1854); Toms v. Williams, 41 Mich., 552, 559 (1879); Rogers v. Smith, 4 Pa. St., 93, 101 (1846); Whitney v. Olney, 3 Mason, 280, 281 (U. S. C. C., R. I., 1823).]

annexed to the freehold.[2] The rule on this subject seems to be that the devisee takes the land in the same condition in which it would have descended to the heir, and hence will be entitled to everything that would be regarded as a fixture descending with the land as between heir and executor.[3]

[*313] *With regard to testamentary dispositions of fixtures separately from the land, the rule has been laid down, that "where a testator has a devisable interest in a house, etc., he may devise the incidents of the house and things that are annexed to the house either together with, or in separation from the freehold. On the other hand, if the estate itself is not devisable, the things which are annexed to it are not in general devisable; and therefore a tenant for life or in tail cannot devise the doors, windows or wainscot of a house, nor personal chattels that are affixed to the house and which form a part of it; but such a devise is void. But even in this case the testator may devise away such fixtures as are severable from the freehold, and which would go to his personal representative; because these are not incident to the inheritance."[4] And in like manner, tenant's or trade fixtures, removable by the tenant as against the landlord during his term, may, of course, be disposed

[2] Ferard on Fixt., 246.

As to what are fixtures by construction, see *ante*, p. *33.

[A devisee of land will not take trees severed from the soil by an extraordinary gale. *Re* Ainslie (1885), 30 Ch. D., 485, overruling (1884) 28 Ch. D., 89, 92.]

[3] Ferard on Fixt., 247. Mr. Ferard does not regard this point, however, as free from difficulty, and refers to the case of emblements which go with the land to the devisee, but not to the heir. The case of emblements, however, seems in this respect so entirely anomalous and exceptional as to furnish no argument against the rule above stated.

[A claim by a legatee against a devisee falls within the principles of decisions between executor and heir, where the executor is least favored. Tapestry cut to cover spaces in the walls, and nailed to battens nailed to brick-work, not removable without injury to the tapestry and the walls, passes to a devisee of the house. Norton v. Dashwood [1896], 2 Ch., 497.]

[4] Ferard on Fixt., 245; Swinb., pt. 3, § 6. [See *Re* DeFalbe [1901], 1 Ch., 523.]

[Where a life tenant attempts to devise land in fee, this will not give the devisee any claim for betterments made by the life tenant. Schimpf v. Rhodewald, 62 Neb., 105, 113 (1901).]

of by the tenant by last will and testament.[5] The intention of the testator to make a testamentary disposition of fixtures separately from the freehold must, however, in order to be effectual, be evidenced by the use of some appropriate term or description; and any terms clearly indicating such intention would probably be held sufficient.

With reference to the term "furniture," the better opinion seems to be that by the use thereof, articles of furniture, in the ordinary sense of that term, will pass though temporarily fixed to the house for convenience of use, they being, as was observed by the Vice Chancellor in Paton v. Sheppard,[6] not the less furniture because so fixed. The term is, however, a *very general and indefinite one, and there is some con- [*314] fusion among the authorities on the question.[7] By the use,

[5] See Johnston v. Swann, 3 Mad., 457 (1st Am. Ed., p. 236) (1818), where fixtures in a leasehold house, which the testator had a right to remove (devises of land and bequests relating to interests in real property being in certain cases void under the statute), were considered as mere personal chattels forming a part of the residue and passing under a bequest of the residue of personal estate for charitable purposes.

[6] 10 Sim., 186 (1839). See, also, Beck v. Rebow, 1 P. Wms., 94 (1706).

[7] In Kelley v. Powlet, Ambl., 605 (1763); s. c., 1 Dick., 559, the Master of the Rolls said: "The word 'household furniture' has as general a meaning as possible, it is incapable of a definition. It is capable only of a description. It comprises everything that contributes to the use or convenience of the householder, or ornament of the house." See, also, Cole v. Fitzgerald, 1 Sim. & Stu., 189 (1823); s. c., 3 Russ., 301. It would seem that to hold that by the use of the term "furniture" (in this larger sense) all the articles comprised within the above description pass whether fixed or not, tends to obliterate all distinction between furniture and domestic and ornamental fixtures so far as this question is concerned. There are, however, cases which seem to make almost as broad an application of the term. Thus in Paton v. Sheppard (*supra*), under a bequest of "household furniture," stoves, blinds, bell-pulls and other articles generally considered as tenant's fixtures, belonging to the testator in a leasehold house occupied by him were held to pass. The Vice Chancellor observed in this case that "they were fixed to the house in this sense, namely, that it was at his option to remove them, if he thought proper so to do; but they are not the less furniture because they were fixed to the house." See, also, Pinder v. Pinder, 18 W. R., 309 (1870).

There seems to be a distinction as to whether the furniture is annexed by the owner of the fee, or to a leasehold estate, though it seems difficult to see how what is furniture in one case is not equally so in the other. Com-

however, of the terms "fixed furniture," or some other terms of equivalent import, the meaning of the testator that such articles should pass may be rendered sufficiently certain.[8]

In Slanning v. Style[9] the testator bequeathed all his "house-[*315] *hold goods and implements of household," which words were held to include a clock in the house, "if not fixed thereto;" and from these last words the inference has been drawn that if articles of this sort are fixed, they will not pass under a bequest of household goods.[10] But, unless the annexation is permanent or habitual, so as to take away the character of being a chattel, no reason is seen for any such distinction. The question, however, in all such cases is one upon which the intention of the testator has a controlling influence.[11]

pare with Paton v. Sheppard (*supra*), Allen v. Allen, Mosely, 112 (1728), where it was held, that under the term "furniture" in a bequest to the defendant, the defendant was not entitled to marble slabs, or chimney-pieces, or anything fixed to the freehold or the testator's own estate. And it was stated that glasses in panels were to be considered as part of the freehold, but not if screwed in, and that there was a great difference between the heir and devisee, or the executor and devisee, and a landlord and tenant.

[As a general rule a bequest of "furniture" by a lessee will not pass tenant's fixtures, such as mantel-pieces, stoves, kitchen dressers, shelves, etc., though some fixtures might be included. Finney v. Grice (1878), 10 Ch. D., 13, 15.]

[8] See Birch v. Dawson, 6 C. & P., 658 (1834); s. c., 2 Ad. & E., 37. [See, *ante*, p. *7.]

In the report of this case at *nisi prius* (6 C. & P., 658) a doubt was expressed by Littledale, J., whether a carpet tacked to a floor was fixed furniture, "because carpets, though tacked, are often taken up and put down again." See, also, Beck v. Rebow, 1 P. Wms., 94 (1706).

[9] 3 P. Wms., 334 (1734).

See, also, Stewart v. Earl of Bute, 3 Ves., 212 (1796); 11 Ves., 657 (1813), where a testator gave all his wagon-ways, etc., and all implements, utensils and things used for the working of his collieries and which might be deemed as of the nature of personal estate, to be held with the collieries. *Held*, that under this bequest, *inter alia*, fire-engines passed. But the question does not seem to have been considered with reference to the law of fixtures.

[10] Ferard on Fixt., 249.

[11] Thus in Wood v. Gaynon, Ambl., 395 (1761), where a testator devised his copyhold estate, which consisted of a brew-house and malt-house, let to a third party, together with the plant, both at the time of making the will and at the decease of the testator, it was *held*, that the plant passed

with the brew-house, although there was a bequest of the personal estate to the complainant, it appearing to the court from the fact that the whole was in lease as aforesaid, and that without the plant the walls would be of no use, that it was the intention of the testator to devise the plant.

So, in Pinder v. Pinder, 18 W. R., 309 (1870), where a testator by his will gave all his real and leasehold estates, and also all his stock in trade, money at bank, good will, book debts and effects belonging to his business of an earthenware manufacturer to his son, and charged his real and leasehold estates with the payment of legacies to his other children, which estates were sold for the payment thereof and bought in by the son, and the question was whether the fixtures on the property sold were bought by the son, or whether he acquired them under the word "effects;" or in other words, whether they passed under the devise of the real and leasehold estates or under the word "effects," it was *held*, that, it being the testator's obvious intention that the son should continue the business, and also that his other children should have an ample provision, as he could not carry on the business without these fixtures, they were included in the words "effects belonging to the business," and that the words "stock in trade, good will, book debts and effects" must be construed in their largest possible sense, passing everything in any way relating to the business.

[A gift of "all the furniture and other personal effects belonging to me, and which at the date of my death are at the Roebuck Hotel," does not cover the fixtures which the testator, as tenant, had a right to remove. *Re* Seton-Smith [1902], 1 Ch., 717, 720.]

[Under a bequest of "furniture and articles of household use and ornament" an altar stone not physically attached, and relics placed in a cavity thereunder, do not pass, both altar and relics forming part of a chapel as used for religious purposes, although the altar stone, by ecclesiastical custom, could only be used while the chapel was licensed, and the license for mass had been withdrawn. Petre v. Ferrers (1891), Weekly Notes, 171.]

It seems, also, that by the devise of a West India plantation by name not adding "cattle, stock, implements and utensils," the cattle, stock, implements and utensils upon it will pass. Lushington v. Sewell, 1 Sim., 435, 451, 479 (1827). See, also, Johnston v. Dobie, Mor. Dict., 5443 (1782).

[Where a testator devises unimproved land, it passes land upon which tenants have erected buildings which are the personal property of the tenants. Coles v. Coles, 37 Atl., 1025 (N. J., 1897).]

[*316] *IV. Of the Relation Sustained by Recording Acts to the Law of Fixtures.

The subject considered at the end of the second section sometimes becoming a material inquiry in considering questions arising under statutes relating to the recording of instruments of conveyance, the effect of such recording acts upon the law of fixtures will be next considered.

It may be stated as a general rule that fixtures placed upon demised premises by a tenant and which are removable by him during his term as against his landlord, annexations made upon the land of another by one under an agreement reserving the right of removal, and also fixtures sold by the owner of the land to a third person, but not actually severed, do not pass by a subsequent conveyance or mortgage of the land to one having notice of such right.[1] The doctrine in relation to

[1] Coleman v. Lewis, 27 Penn. St., 291 (1856); Davis v. Buffum, 51 Me., 160 (1863); Wilgus v. Gettings, 21 Iowa, 177 (1866); Sowden v. Craig, 26 Iowa, 156 (1868); Morris v. French, 106 Mass., 326 (1871); Hensley v. Brodie, 16 Ark., 511 (1855); Mitchell v. Freedley, 10 Penn. St., 198 (1849); Hunt v. Bay State Iron Co., 97 Mass., 279 (1867); Haven v. Emery, 33 N. H., 66 (1856); Pierce v. Emery, 32 N. H., 484 (1856). See, also, Oliver v. Vernon, 6 Mod., 170 (1704); King v. Wilcomb, 7 Barb., 263 (1849); Dame v. Dame, 38 N. H., 429 (1859); Crippen v. Morrison, 13 Mich., 23 (1864); Yater v. Mullen, 23 Ind., 562 (1864); s. c., 24 Ind., 277. [Wood v. Holly Mfg. Co., 100 Ala., 326 (1893); Harmon v. Kline, 52 Ark., 251, 252 (1889); Mantooth v. Burke, 35 Ark., 540, 546 (1880); Brodrick v. Kilpatrick, 82 Fed., 138, 139 (U. S. C. C., Cal., 1897); Isenhoot v. Chamberlain, 59 Cal., 630, 639; Sword v. Low, 122 Ill., 487 (1887); Malott v. Price, 109 Ind., 22, 25 (1886); Fischer v. Johnson, 106 Iowa, 181, 184 (1898); Jones v. Cooley, 106 Iowa, 165, 167 (1898); Western Union Tel. Co. v. Burlington & Southwestern R'y Co., 11 Fed., 1 (U. S. C. C., Iowa, 1882); Walker v. Schindel, 58 Md., 360, 364 (1882); Handforth v. Jackson, 150 Mass., 149, 154 (1889); Southbridge Sav. Bank v. Exeter Mach. Works, 127 Mass., 542, 545 (1879); Manwaring v. Jenison, 61 Mich., 117, 139 (1886); Read v. Horner, 90 Mich., 152 (1892); Nickerson v. Wells-Stone Co., 71 Minn., 230, 238 (1898); Warner v. Kenning, 25 Minn., 173, 174 (1878); McDonnell v. Burns, 83 Fed., 866 (U. S. C. C. A., Mo., 1897); Priestly v. Johnson, 67 Mo., 632 (1878); Omaha B. & T. R'y Co. v. Whitney, 99 N. W., 525 (Neb., 1904); Moore v. Moran, 64 Neb., 84, 87 (1902); Holt County Bank v. Tootle, 25 Neb., 408, 419 (1889); Dietrichs v. Lincoln & N. W. R. R. Co., 13 Neb., 43 (1882); Simons v.

Pierce, 16 Ohio St., 215 (1865); New Chester Water Co. v. Holly Mfg. Co., 53 Fed., 19 (U. S. C. C. A., Pa., 1892), aff'g Holly Mfg. Co. v. New Chester Water Co., 48 Fed., 879 (U. S. C. C., Pa., 1891); Dominick v. Farr, 22 S. C., 585 (1885); Hertzberg v. Witte, 22 Tex. Civ. App., 320, 323 (1899); Austral Otis Co. v. Andrew Kerr Co., 16 Vict., 744 (1890); see, also, Wallace v. Dodd, 136 Cal., 210 (1902); Tomlinson v. Ayres, 117 Cal., 568 (1897); Berger v. Hoerner, 36 Ill. App., 360, 362 (1889); Green Bay Lumber Co. v. Ireland, 77 Iowa, 636 (1889); Brooks v. Prescott, 114 Mass., 392, 397 (1874); Warner v. Kenning, 25 Minn., 173 (1878); Duke v. Shackleford, 56 Miss., 552 (1879).]

[A cooking range placed in a hotel by one under contract of purchase, does not pass to the grantor of the hotel, upon his resuming possession, he having notice that the seller of the range had reserved title. John Van Range Co. v. Allen, 7 So., 499 (Miss., 1890).]

[See Meffert v. Dyer, 81 S. W., 643 (Mo. App., 1904), that a lessee is not entitled to corn standing upon the premises which the lessor, at the time he leases the premises, informs him belongs to a prior lessee.]

[A mortgage covers fixtures upon land although the mortgagee has notice of a previous sale thereof which, being verbal, was void. Brown v. Roland, 92 Tex., 54, 57 (1898).]

In McCracken v. Hall, 7 Ind., 30 (1855), it was *held* that a pump put in a well by one as tenant of a dowress, himself being the reversioner of the estate, did not pass by a conveyance by the tenant of the reversion and by the dowress of her estate. See Wiltshear v. Cottrell, 1 Ell. & Bl., 674 (1853).

A chattel mortgage of machinery and other things which as between landlord and tenant would be trade fixtures, will give the mortgagee a valid lien as against a subsequent assignee in bankruptcy, who has sold the equity of redemption in the real estate to which such fixtures are annexed for a sum equal to the value of such fixtures, and who must be considered to have taken with notice, although as against the prior mortgagee of the realty the fixtures would be realty, where it appears that such prior mortgagee makes no claim to the fixtures. *Ex parte* Ames, 1 Lowell's Dec., 561 (1871); s. c., 7 Nat. Bank Reg., 230.

An assignee or grantee for the benefit of creditors, also, who simply succeeds to the rights of his grantor in the premises, is bound by a prior chattel mortgage of things affixed to the freehold. Griffin v. Allen, Supr. Ct. of Buffalo, 2 Clint. N. Y. Dig., 1415, pl. 47 (1857).

[Where a landlord re-enters for non-payment of rent, and, under a provision in the lease, takes possession of the tenant's improvements he can not claim an engine sold to the tenant but not paid for, the seller reserving title, as the landlord is not a purchaser for value, and takes no better title than his tenant had. Webster v. Bates Machine Co., 64 Neb., 306, 308 (1902).]

[Where the owner of a mill has acquired his interest by the assignment of a written instrument, which is only assignable on the assumption that it relates to a chattel interest, and the instrument recognizes the right

[*317] *landlord and tenant is generally stated, without reference to the question of notice, to be, that a conveyance by the

of the assignor to treat the mill as personalty, he is chargeable with notice of the nature and quality of the interest assigned, and that it was liable to be encumbered by a chattel mortgage. Malott v. Price, 109 Ind., 22, 25 (1886).]

[The lien of a judgment or attaching creditor is not superior to the claims of third parties to fixtures. Gates Iron Works v. Cohen, 7 Colo. App., 341 (1896); *Re* Worland, 92 Fed., 893, 895 (U. S. Dist. Ct., Iowa, 1899); Cleveland Works v. Lang, 67 N. H., 348, 364 (1892); Brown v. Sage, 11 Gr. Ch., 239, 244 (Ont., 1865).]

[A mechanics' lien will not attach to fixtures belonging to third parties. Jordan v. Myres, 126 Cal., 565 (1899); State v. O'Neil Lumber Co., 77 Mo. App., 538 (1898); see, also, West Coast Lumber Co. v. Apfield, 86 Cal., 335 (1890).]

[A purchaser of land acquires no title to a fixture thereon as against the seller of such fixture who has brought suit to foreclose his lien. San Antonio Brew. Ass'n v. Arctic Mach. Co., 81 Tex., 99 (1891).]

[Where a grantee of land knew that the grantor had purchased a steam-engine upon the premises, on credit, that the grantor was financially embarrassed, and the grantee made no farther investigation than to examine the record of chattel mortgages, *held*, that the grantee could not retain the engine as against the seller thereof who had reserved title, and who did not know the manner in which it was attached to the realty. Ingersoll v. Barnes, 47 Mich., 104 (1881).]

[Where, in Louisiana, by fiction of law, mules placed upon a plantation become "immovable by destination," this will not defeat a vendor's privilege upon the mules. Hibernia Nat. Bank v. Sarah Planting Co., 107 La., 650 (1902).]

[A privilege for supplies furnished for a growing crop does not need to be registered to be valid as against a purchaser of the land without notice. Weil v. Kent, 52 La. Ann., 2139, 2144 (1900).]

[Where a grantee of land, knowing of a previous sale of scales thereon, can not claim them, he does not acquire any greater right thereto by a subsequent conveyance to him of the wife's inchoate interest in the land. Keeney v. Whitlock, 7 Ind. App., 160 (1893).]

[Culm mined from its original place by a lessee, and piled upon the land, is the personal property of the lessee, and does not pass to a grantee of the lessor. Lehigh Coal Co. v. Wilkes-Barre & E. R. R. Co., 8 Luz. Leg. Reg. R., 540, 547 (1897); 187 Pa. St., 145, 149 (1898).]

[An unpaid seller retaining title to ice-machines which are attached to realty upon which is a mortgage covering all machinery "to be affixed thereto," has a lien prior to the holders of bonds which are bought subsequent to the contract of sale with notice of the conditions, although the conditional seller had constructive notice of the terms of the mortgage. Central Trust Co. v. Arctic Ice Co., 77 Md., 202 (1893).]

landlord of the demised premises will not convey to the grantee the tenant's fixtures.[1] In this relation, however, the possession of the tenant is in itself sufficient to put the purchaser upon inquiry and he is bound at his peril to ascertain the nature and extent of the tenant's rights, so that the doctrine of *bona fide* purchase without notice can rarely in this relation become material to the determination of the question.[2]

[1] See Raymond v. White, 7 Cow., 319 (1827). See, also, Davis v. Buffum, 51 Me., 160 (1863). [Union Terminal Co. v. Wilmar & S. F. R'y Co., 116 Iowa, 392, 396 (1902); see, also, Bartlett v. Haviland, 92 Mich., 552, 555 (1892); Sherrick v. Cotter, 28 Wash., 25 (1902); Atkinson v. Noad, 14 Low. Can., 159 (1863); but see Smyth v. Stoddard, 105 Ill. App., 510, 515 (1903).]

[A tenant upon land which has been condemned for the right of way of a railroad, has the same right to remove buildings and trade fixtures which he could have removed as against his landlord. Schreiber v. Chicago & Evanston R. R. Co., 115 Ill., 340, 346 (1885).]

[The fact that a grantee of the land subsequently receives an assignment of the interest of a lessee in a building thereon, does not merge the two interests to the extent of making the building a part of the realty, the building having originally been personal property, and continuing to be so treated by the landowner, and excepted in all conveyances of the land. Sweet v. Henry, 175 N. Y., 268 (1903), reversing 66 App. Div., 383, 390 (1901).]

[See Sowles v. Raymer, 110 Mich., 189 (1896), as to parties being estopped by their acts from removing a saw-mill after foreclosure sale of the land.]

See, however, as to erections made by a firm upon the land of one of the partners, passing to a subsequent mortgagee, *Ex parte* Scarth, 1 Mont. Dea. & DeG., 240 (1840). See, also, Trappes v. Harter, and the cases explaining it, cited *ante*, pp. *276, *283, in this chapter.

[Where the mortgagor is a member of a firm which has the right to remove buildings, while his possession might not be notice to the mortgagee, the possession of the other partner would be. Kerr v. Kingsbury, 39 Mich., 150, 156 (1878).]

[2] See Wing v. Gray, 36 Vt., 267 (1863); Dubois v. Kelly, 10 Barb., 508 (1851). See, however, Prince v. Case, 10 Conn., 375 (1835); Powers v. Dennison, 30 Vt., 752 (1858), where the mere fact that the licensee occupied the building, the possession of the land generally being in the owner, is considered "only notice that a person is in possession, and of nothing more; it does not prove that he claimed title, or that he was any other than a tenant of the owner of the land." See, also, Landon v. Platt, 34 Comm., 517 (1868); Slack v. Gay, 22 La. Ann., 387 (1870).

[The following cases sustain the rule that the possession of a tenant is notice of his right to fixtures: Security Loan Co. v. Williamette Mills

Co., 99 Cal., 636, 641 (1893); Royce v. Latshaw, 15 Colo. App., 420, 425 (1900); Polle v. Rouse, 73 Miss., 713, 717 (1896); Friedlander v. Ryder, 30 Neb., 783, 788 (1890); Van Keuren v. Central R. R. Co. of N. J., 38 N. J. Law, 165, 167 (1875); Sweet v. Henry, 175 N. Y., 268, 277 (1903), reversing 66 App. Div., 383 (1901); Allen v. Gates, 73 Vt., 222, 228 (1900); Close v. Belmont, 22 Gr. Ch., 317 (Ont., 1875); see, also, Best v. Stoneback, 39 Kan., 170, 172 (1888). But see Smyth v. Stoddard, 203 Ill., 424 (1903); Brown v. Roland, 11 Tex. Civ. App., 648, 655 (1895); Shelton v. Ficklin, 32 Gratt., 727, 737 (Va., 1880).]

[There is no presumption that a purchaser of land had no notice of the right of a tenant thereon to remove buildings. A claim to improvements on the ground that the vendee paid full value and was without notice of the right to remove improvements, must be pleaded and proved. Isenhoot v. Chamberlain, 59 Cal., 630, 639 (1881).]

[The mere presence of a lessee of a building at a foreclosure sale thereof does not affect his rights as to fixtures therein which are removable as between vendor and vendee. L'Hote v. Fulham, 51 La. Ann., 780, 784 (1899).]

[Where a tenant takes a deed to the premises for the purpose of security, afterwards reconveying to his landlord, who conveys to another, the last grantee does not acquire any right to structures which are trade fixtures, the tenant paying rent during his entire term, and his possession being notice of his rights. Security Loan Co. v. Williamette Mills Co., 99 Cal., 636, 641 (1893).]

[A growing crop of vegetables raised by a tenant in possession is personal property; and the grantor of the land is, therefore, not estopped by the covenants of title in his warranty deed from purchasing such crops from the tenant. Simanek v. Nemetz, 97 N. W., 508 (Wis., 1903).]

[See New Chester Water Co. v. Holly Mfg. Co., 53 Fed., 19 (U. S. C. C. A., Pa., 1892), aff'g Holly Mfg. Co. v. New Chester Water Co., 48 Fed., 879 (U. S. C. C., Pa., 1891), where the seller reserved a lien upon pumping engines, which remained in charge of his paid agent.]

[Where the owner of buildings does not own the land upon which they are built, his property is personal in character, and goes to the personal representative. If such personal representative, while in possession of the buildings, and in her personal capacity, purchases the land upon which the buildings stand, such buildings become a part of the realty as to anyone without notice dealing with the landowner; and the proceedings in the probate court are not constructive notice. Seibel v. Bath, 5 Wyo., 409, 426 (1895).]

[Where a grantee conveys land to one without actual notice of a reservation by the grantor of fixtures thereon, the sub-grantee is entitled to such fixtures as are a part of the realty; and the fact that the grantor remains in possession does not require such sub-grantee to make inquiry of him as to his interest, as his deed is conclusive upon that subject so far as the sub-grantee is concerned. VanKueren v. Central R. R. of N. J., 38 N. J. Law, 165, 167 (1875).]

In cases, however, of annexations to the land of another by his consent under an agreement express or implied that the property annexed shall remain the personal property of the person who annexed it, such person being in possession neither of the land nor the annexation thereto, it often becomes material. In such a case the article annexed is, as between the immediate parties to such agreement, unquestionably mere personalty.[3] And by the courts in several States it is held that such annexation retains its character of personalty as against third persons purchasing or taking a mortgage upon the land upon which it stands, *bona fide* and without notice of such agreement; that it does not pass with the land to, and may be removed by the party annexing it as against *such *bona fide* purchaser or mortgagee.[4] It is, however, [*318]

[3] See, however, the limitation to the rule stated *ante*, chap. 1, p. *23.

[4] Russell v. Richards, 10 Me., 429 (1833); s. c., 11 Id., 371; Hilborne v. Brown, 12 Id., 162 (1835); Tapley v. Smith, 18 Id., 12 (1840); Ford v. Cobb, 20 N. Y., 344 (1859); Godard v. Gould, 14 Barb., 662 (1853). [Adams Mach. Co. v. Interstate Loan Ass'n, 119 Ala., 97 (1898); Richards v. Gilbert, 116 Ga., 382, 385 (1902); Peaks v. Hutchinson, 96 Me., 530 (1902); Duntz v. Granger Brew. Co., 83 N. Y. Supp., 957, 959 (1903); Kerby v. Clapp, 15 App. Div., 37, 39 (N. Y., 1897); Case v. L'Oeble, 84 Fed., 582, 585 (U. S. C. C., Pa., 1897); Deal v. Smart, 1 Tex. Ct. App., Civ., § 1080 (1881); Leonard v. Willard, 23 Que., C. S., 482 (1902); see, also, Butler v. Adler-Goldman Co., 62 Ark., 445, 450 (1896); Atlantic Trust Co. v. Atlantic City Laundry Co., 64 N. J. Eq., 140, 147 (1902); Hirsch v. Graves Elevator Co., 53 N. Y. Supp., 664 (1898).]

In Ford v. Cobb, salt-kettles were bought by the owner of land and mortgaged to the seller as personalty, the mortgage reciting the sale and that the kettles were to be set up in the salt-blocks of the owner of the land and that the mortgagee was to have a right to retake possession on default of payment, which mortgage was promptly filed according to statute. The kettles were set up in brick arches in such a manner that they could not be removed without displacing a portion of the brick at inconsiderable expense, but the course of manufacture required them to be thus removed and reset annually. The owner of the land subsequently conveyed the land to the plaintiff, who purchased and took his conveyance without notice of the claim of the mortgagee, other than the constructive notice by such filing of the mortgage. *Held*, that the kettles continued to be personalty and did not pass by the conveyance of the land. See, also, Mott v. Palmer, 1 N. Y., 564 (1848); Hensley v. Brodie, 16 Ark., 511 (1855); Crippen v. Morrison, 13 Mich., 34 (1864); Sheldon v. Edwards, 35 N. Y., 279 (1866). [Duffus v. Howard Furnace Co., 8 App. Div., 567 (1896), reversing 37 N. Y. Supp., 19 (1895).]

laid down as a limitation upon this rule that whether an agreement shall preserve the character of personalty in things so affixed to the freehold as that but for such agreement they would become part of the realty, depends upon their essential character, and the mode in which they are annexed, *e. g.*, whether they can be removed without serious damage to the freehold, or substantially destroying their own qualities or value; in other words, the limitation is where the subject or mode of annexation is such that the attributes of personal property cannot be predicated of the thing in controversy.[5]

In Mott v. Palmer, the grantor covenanted that he was the "lawful owner of the premises granted, and seized of a good and indefeasible estate of inheritance therein clear of all incumbrance." There was on the land at the time of the execution of the deed a quantity of rails erected into a fence by the owner of adjoining land under an agreement with the grantor to inclose and occupy temporarily as a tenant, with leave to remove the rails whenever he saw fit to do so. It does not appear that the tenant was in the occupation of the land at the time of the execution of the deed. *Held*, that the fence being within the description of the thing granted, and a part of that which the deed purported to convey (though, in fact, the personal property of a third person), an action was maintainable for a breach of the covenant of seizin.

[Where a lot with the buildings thereon was conveyed with a special warranty, the removal of a house by a tenant under a prior agreement with the grantor, is a breach of the covenant. West v. Stewart, 7 Pa. St., 122 (1847). [See Atkinson v. Noad, 14 Low. Can., 159 (1863).]

[Where a machine which is a part of real estate conveyed by warranty deed, is an infringement of a patent, the claim of the patentee is an incumbrance which constitutes a breach of the covenant against incumbrances. Cream City Mirror Plate Co. v. Swedish B. & L. A., 74 Ill. App., 362, 365 (1897).]

[The removal of shelves, counters, etc., by a former lessee having a right thereto, is a breach of a covenant in a lease. Cameron v. Tarratt, 1 Up. Can. Q. B., 312.]

[5] See *ante*, chap. 1, p. *23; chap. 3, p. *68, and notes. [Baldwin v. Young, 47 La. Ann., 1466 (1895); Carlin v. Gordy, 32 La. Ann., 1285 (1880); Lansing Iron Works v. Walker, 91 Mich., 409 (1892); Henkle v. Dillon, 15 Oreg., 610, 616 (1888); Mundine v. Pauls, 28 Tex. Civ. App., 46 (1902); Austral Otis Co. v. Kerr, 16 Vict., 744 (1890); see, also, Polson v. Degeer, 12 Ont., 275 (1886).]

[A hay-scale, easily removed from the walled pit in which it is suspended, does not pass under a mortgage of the land as against an unpaid seller. Garven v. Hogue, 14 Wkly. Cin. Law Bul., 175 (C. C., 1885).]

[Pumps, tanks, etc., in a brewery, where the seller has reserved title

*The rule above laid down that an agreement to con- [*319] sider a fixture a chattel, which is binding as between the parties thereto, is also equally binding as against subsequent *bona fide* purchasers or mortgagees without notice, of the land upon which it is situated, has, however, been often disapproved; and the sounder rule and one more in accordance with the policy of the recording laws of this country, is to require actual severance or notice of a binding agreement to sever in order to deprive the purchaser or a creditor levying upon the land and fixtures of the right to the fixtures or appurtenances to the

until paid, are not covered by a mortgage of the real estate although such machinery is connected by pipes, and its removal would necessitate openings being made in the side of the building. Duntz v. Granger Brew. Co., 83 N. Y. Supp., 957 (1903).]

[See Lyon v. London C'y Bank [1903], 2 K. B., 135, where chairs screwed to the floor were held not to pass under a mortgage of a hippodrome.]

In Tifft v. Horton, 53 N. Y., 377, 384 (1873), an engine and boiler were not considered to come within this limitation. In this case plaintiffs sold to B. an engine and boiler to be erected in an elevator owned by B.; a chattel mortgage was executed by B. on the property, before delivery thereof, to secure unpaid purchase money, which provided that the engine and boiler should be and remain personal property until the notes mentioned in it were paid, notwithstanding the manner in which it should be placed in the elevator, and authorized the plaintiffs on breach of condition to re-take and carry away the engine and boiler. They were placed on a foundation made for them, and an engine-house afterwards built over them, so that they could not be removed without some injury to the walls built up about them, but they had not become a part of the building, nor would their removal take away or destroy anything essential to the support of the main building or other part of the real estate to which they were attached. Upon the foreclosure of a mortgage upon the premises prior to their annexation, defendant became purchaser, and on demand of the plaintiff for the engine and boiler after default made, action was brought for their conversion. *Held*, that defendant acquired no lien on the engine and boiler by his mortgage, and that plaintiff could recover.

See, however, Fryatt v. Sullivan Co., 5 Hill, 116 (1843); s. c., 7 Id., 529; Voorhees v. McGinnis, 48 N. Y., 278, 287 (1872); Frankland v. Moulton, 5 Wis., 1 (1856).

[See Case Mfg. Co. v. Garven, 45 Ohio St., 289 (1887), modifying Garven v. Hogue, 14 Wkly. Cin. Law Bul., 175 (C. C., 1885), where a distinction is made between motive power and machinery, and holding that the latter does not pass to a mortgagee of the land without notice.]

freehold.[1] And according to the better opinion, the record or filing of a chattel mortgage being constructive notice only of

[1] Fortman v. Goepper, 14 Ohio St., 565 (1863), per White, J.; Brennan v. Whitaker, 15 Ohio St., 446 (1864); Powers v. Dennison, 30 Vt., 752 (1858); Davenport v. Shants, 43 Vt., 546 (1871); Hunt v. Bay State Iron Co., 97 Mass., 279 (1867); Haven v. Emery, 33 N. H., 66, 69 (1856); Bringholff v. Munzenmaier, 20 Iowa, 513 (1866); 2 Smith's Lead. Cas., * 259; Id., 7th Am. Ed., p. 221; Fryatt v. Sullivan Co., 5 Hill, 116 (1843); Trull v. Fuller, 28 Me., 545 (1848), where a creditor levied upon the mill and machinery as realty; Prince v. Case, 10 Conn., 375 (1835); Landon v. Platt, 34 Conn., 517 (1868). See, also, Dostal v. McCadden, 35 Iowa, 318 (1872); Pierce v. George, 108 Mass., 78 (1871); Bratton v. Clawson, 2 Strobh. Law, 478 (1848); s. c., 3 Id., 127; Thropp's Appeal, 70 Penn. St., 395 (1872). [Cunningham v. Cureton, 96 Ga., 489, 492 (1895); Smyth v. Stoddard, 203 Ill., 424 (1903); Fifield v. Farmers Nat. Bank, 148 Ill., 163 (1893); Fisher v. Patterson, 197 Ill., 414, 417 (1902), aff'g 99 Ill. App., 70 (1900); Simpson Brick Press Co. v. Wormley, 61 Ill. App., 460, 463 (1895); Bass Foundry Works v. Gallentine, 99 Ind., 525, 528 (1884); Thomson v. Smith, 111 Iowa, 718, 720 (1900); Fletcher v. Kelly, 88 Iowa, 475, 487 (1893); Stillman v. Flenniken, 58 Iowa, 450 (1882); Rowand v. Anderson, 33 Kan., 264, 268 (1885); Wentworth v. Woods Co., 163 Mass., 28, 32 (1895); Ridgeway Stove Co. v. Way, 141 Mass., 557 (1886); Southbridge Sav. Bank v. Stevens Tool Co., 130 Mass., 547 (1881); Smith Paper Co. v. Servin, 130 Mass., 511, 516 (1881); Southbridge Sav. Bank v. Exeter Mach. Works, 127 Mass., 542, 545 (1879); Tuck v. Olds, 29 Fed., 738 (U. S. C. C., Mich., 1886); Watson v. Alberts, 120 Mich., 508, 509 (1899); Wickes v. Hill, 115 Mich., 333, 339 (1897); Knowlton v. Johnson, 37 Mich., 47 (1877); Hazlehurst Lumber Co. v. Fay, 18 So., 485 (Miss., 1895); Moore v. Moran, 64 Neb., 84, 88 (1902); Carroll v. McCullough, 63 N. H., 95, 96 (1884); Keeler v. Keeler, 31 N. J. Eq., 181, 190 (1879); Lacrustine Fertilizer Co. v. Lake Guano Co., 82 N. Y., 476, 485 (1880); Jermyn v. Hunter, 93 App. Div., 175 (N. Y., 1904); Case Mfg. Co. v. Garven, 45 Ohio St., 289, 302 (1887), aff'g Garven v. Hogue, 14 Wkly. Cin. Law Bul., 175 (C. C., 1885); Muir v. Jones, 23 Ore., 332, 337 (1892); Landigan v. Mayer, 32 Ore., 245, 250 (1898); Schmaltz v. York Mfg. Co., 204 Pa. St., 1 (1902); Brown v. Roland, 11 Tex. Civ. App., 648, 653 (1895); Shelton v. Ficklin, 32 Gratt., 727 (Va., 1880); McDonald v. Weeks, 8 Gr. Ch., 297 (Ont., 1880); Goldie v. Hewson, 35 N. Brunsw., 349, 359 (1901); Leonard v. Boisvert, 10 Que., S. C., 343, 370 (1896); Nicholson v. Bank of New Zealand, 12 N. Z., 427, 439 (1894); see, also, Nelson v. Howison, 122 Ala., 573, 578 (1898); Binkley v. Forkner, 117 Ind., 176, 186 (1888); Swoop v. St. Martin, 110 La., 237 (1903); J. L. Mott Iron Works v. Reilly, 81 N. Y. Supp., 323 (1903); Sinker v. Comparet, 62 Tex., 470 (1884); Laine v. Beland, 26 Can., 419 (1896), aff'g Beland v. Laine, 4 Q. B., 354 (Que., 1895); Budden v. Knight, 3 Que. L. R., 273, 282 (1877); Rose v. Hope, 22 Up. Can. C. P., 482.]

*an incumbrance upon goods and chattels is not sufficient [*320] to deprive such purchase or mortgage of the real estate of its *bona fide* character.[1] And a mortgage of realty and fixtures appurtenant thereto, if duly recorded as a mortgage of realty,

[The fact that a grantee did not see the articles before he bought, is immaterial, as he bought the house as it was, and there was nothing to put him upon inquiry. Ridgeway Stove Co. v. Way, 141 Mass., 557, 560 (1886).]

[A "hire plate" upon an engine, showing property in the seller thereof, is not notice to a mortgagee of the land who is not aware of it. Hobson v. Gorringe [1897], 1 Ch., 182, 195.]

[An intention between lessor and lessee to regard improvements as personalty, can not convert what the law regards as a part of the realty into personalty, so as to affect the rights of third parties. The lessor can not claim a lien on a mill as personal property as against a mortgagee of the leasehold. First Nat. Bank v. Adam, 138 Ill., 483 (1891).]

[An agreement between the buyer and seller of a machine that it is to remain the property of the seller until paid for, such machine being annexed by the buyer to realty in his possession as tenant, will not avail against one taking an assignment of the lease without notice, where, by the provisions of the lease, machinery is to pass with the reversion to the lessors. Simpson Brick Press Co. v. Wormley, 61 Ill. App., 460, 464 (1895).]

[Where, by agreement, a lessee is to provide the building with a system of heating, for which the lessor is to pay him a certain sum, and the agreement is carried out, but as between the seller and the lessee the sale of the apparatus is conditional, of which the lessor has no notice, the seller can be enjoined by the lessor from removing the apparatus. Camp v. Charles Thatcher Co., 75 Conn., 165 (1902).]

[See Schmaltz v. York Mfg. Co., 204 Pa. St., 1, 18 (1902), in regard to conflict of laws where the fixture is in another state.]

[1] Brennan v. Whitaker, 15 Ohio St., 446 (1864); Bringholff v. Munzenmaier, 20 Iowa, 513 (1866). In this case Dillon, J., said: "They had no *constructive notice* of the plaintiff's right, because the plaintiff's mortgage was a *chattel* mortgage, and recorded and indexed as such. There never having been any *actual severance* of the articles in question, and the same being admitted to constitute, as between vendor and vendee, part of the realty, a subsequent purchaser would not be bound to take notice of a *chattel* mortgage thereon; the statute requiring those to be separately recorded, and separately indexed. Revision, ch. 93 & 96.

"If the defendants at the time of their purchase had been shown to have had knowledge of the plaintiff's mortgage the question then arising would be much more difficult of solution. But without such knowledge, it appears to us plain that the defendants have the title to the property in question. Any other rule would practically nullify the registry laws,

or else introduce the startling doctrine that in examining the title to real estate, the searcher must also examine the records of chattel mortgages. If the defendants, prior to their purchase from Rawson, had visited the premises, they would have seen the property in question, constituting to all appearance part of the real estate. There would be nothing on the ground and nothing in the nature of the property to advise them of the plaintiff's adverse right or ownership. Rawson, and not plaintiff, was, it seems, in possession. If defendants should then examine the records of real estate transfers, they would there discover nothing advising them of the plaintiff's claim. They are, therefore, entitled to and do stand free from it.'' In this case the fixtures were originally owned by the mortgagor and were without an actual severance and while annexed to the realty, chattel mortgaged to plaintiff, and afterwards the real estate to which the fixtures were annexed was sold and conveyed to defendants who had no actual notice of the chattel mortgage. See, also, Eastman v. Foster, 8 Met., 19 (1844); Gooding v. Riley, 50 N. H., 400, 413 (1870). See, however, Ford v. Cobb, 20 N. Y., 344 (1859); Crippen v. Morrison, 13 Mich., 28 (1864).

However, in Sowden v. Craig, 26 Iowa, 156 (1868), Dillon, J., dissenting, the constructive notice by recording of a chattel mortgage upon engines, boilers and saws, which were afterwards with the knowledge and consent of the mortgagee firmly annexed to the realty as fixtures, the chattel mortgage being recorded before such annexation, was regarded as equally effectual for the protection of the mortgagee as actual notice. The defendant in this case without notice purchased the fixtures of the vendee on execution to enforce a mechanic's lien, who had been in possession about two years before taking the machinery to pieces and selling it to defendant. The dissenting opinion in this case seems to be the more reasonable doctrine.

[In Sword v. Low, 122 Ill., 487, 503 (1887), Shope, J., in delivering the opinion of the court, says: ''We can see no hardship in holding that as to articles which necessarily retain their individual characteristics after being annexed to the soil, and which may or may not be fixtures, and which it is apparent may be removed without material injury to the freehold, the purchaser or incumbrancer will be required to take notice of what is apparent upon the public record. * * * * He would be required to take notice of judgment liens, although not apparent upon the land record. So, also, of tax liens. * * * * If the lien may not thus be preserved, no one could buy, on time, property which may become a fixture, and secure the purchase money by a chattel mortgage thereon, for as soon as it is put into use the lien of the mortgage would be extinguished.'' It seems, in this case, that the grantee had actual notice.]

[The following cases sustain the doctrine laid down in the text: Fletcher v. Kelly, 88 Iowa, 475, 484 (1893); Williams v. Hyde, 98 Mich., 152, 153 (1893); Tibbetts v. Horne, 65 N. H., 242, 247 (1889); Case Mfg. Co. v. Garven, 45 Ohio St., 289, 303 (1887), affirming Garven v. Hogue, 14 Wkly. Cin. Law Bul., 175 (C. C., 1885); Ice Co. v. Lone Star

need *not be recorded also as a chattel mortgage in order [*321] to protect such fixtures from the execution creditors of the mortgagor, even though such fixtures are only constructively annexed to the realty.[1]

Works, 15 Tex. Civ. App., 694, 699 (1897); Bacon v. Lewis, 33 Can. Law J., 680, 687 (Ont., 1897); see, also, Malott v. Price, 109 Ind., 22 (1886); Price v. Malott, 85 Ind., 266 (1882); Holt County Bank v. Tootle, 25 Neb., 408, 418 (1889); Rowland v. West, 69 Supr. Ct. (62 Hun), 583, 586 (N. Y., 1892).]

[Where the answer to a complaint to foreclose a chattel mortgage upon a saw-mill and a grist-mill, alleges that they are stationary, that the defendant bought them without notice, and that the records of real estate mortgages do not disclose any mortgage thereon, but does not deny that they are chattels and does not show that they are a part of the realty, is insufficient. Price v. Malott, 85 Ind., 266 (1882).]

[Gas fixtures are "household goods" within the Lien Law, and filing a contract for a conditional sale thereof, being unnecessary under such law, can not operate as constructive notice to one who, at a foreclosure sale under a mechanics' lien, purchased the buildings in which such fixtures have been installed. Baldinger v. Levine, 83 App. Div., 130 (N. Y., 1903).]

[1] Farmers' Loan & Trust Co., v. St. Jo. Rwy. Co., 3 Dill. C. C., 412 (1875). The property in question in this case was railroad rolling-stock, as to which the opinion has been hereinbefore expressed (*ante*, p. *34 *et seq.*) that it is simply personalty and not realty. But the principle stated in the text is nevertheless believed to be correct.

[Allen v. Woodard, 125 Mass., 400 (1878); Williamson v. N. J. S. R. R. Co., 28 N. J. Eq., 277 (1877); McMillan v. Fish, 29 N. J. Eq., 610, 612 (1878); William Firth Co. v. South Carolina Loan Co., 122 Fed., 569 (U. S. C. C. A., S. C., 1903); Kirkpatrick v. Cornwall Street R'y Co., 2 Ont. Law, 113 (App., 1901); Stevens v. Barfoot, 13 Up. Can. App., 366 (1886).]

[Where a mortgage of a Vermont railroad included its cars, and was registered in Vermont, such cars can not be levied upon in Quebec, although the cars were, under a traffic arrangement, in Quebec at the time of the execution of the mortgage, and the mortgage was never registered in Quebec. Baker v. Central Vermont R'y, 4 Revue de Juris., 454 (Super. Ct., Que., 1898).]

[Where the contention was that a surety on a promissory note was discharged because a mortgage, in form and substance a real estate mortgage, was not recorded by the creditor as a chattel mortgage whereby a portion of the security was lost, the court held that the mortgage was of real estate only, with such articles as were attached to it in such manner as to be properly fixtures; and having been recorded as a mortgage of realty, it was not the duty of the mortgagee to cause the instrument to be recorded as a chattel mortgage, nor would it have been proper for him to do so. Allen v. Woodard, 125 Mass., 400, 402 (1878).]

As has been already stated in a preceding section, fixtures and the land upon which they are situated may be the subjects of distinct contracts and separately conveyed, though not necessarily by separate instruments.[2] This sometimes becomes a material subject of inquiry in connection with the construction of acts under certain circumstances requiring the registration of bills of sale, chattel mortgages, etc., affecting the title to personal chattels; and has come under discussion in a number of cases relating to the English Bills of Sale Act, 17 and 18 Vict., chap. 36, the material provision of which, so far as relating to this question, will be found stated in the note below.[3]

[Where a recorded deed provides that the grantee shall erect a shoe factory upon the lots conveyed, and that none of the machinery placed therein shall be removed for five years, this is notice to the seller of machinery to be placed therein. Fifield v. Farmers Nat. Bank, 148 Ill., 163, 168 (1893).]

[2] *Ante*, p. *311.

[3] By the Bills of Sale Act (17 & 18 Vict., c. 36, July 10th, 1854), after reciting that frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons, to the exclusion of the rest of their creditors:—

It is enacted substantially as follows: That every bill of sale (defined in sec. 7, to include also, assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels, and also powers of attorney, authorities or licenses to take possession of personal chattels as security for any debt, with certain exceptions therein specified), of personal chattels (also defined in sec. 7 to mean goods, furniture, fixtures, and other articles capable of complete transfer by delivery, with certain exceptions therein enumerated, as chattel interests in real estate, stocks, etc.), either absolutely or conditionally, or subject or not subject to any trusts, and whereby the grantee or holder shall have power, either with or without notice, and either immediately after the making of such bill of sale or at any future time, to seize or take possession of any property and effects comprised in or made subject to such bill of sale, and every schedule or inventory which shall be thereto annexed or therein referred to, or a true copy thereof, and of every attestation of the execution thereof, shall, together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same, or, in case the same shall be made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such

*It is to be observed that the word "fixtures" as used [*322] in the Bills of Sale Act means that thing which in contemplation of law has a distinct existence as a fixture,[1] articles capable of a complete transfer by delivery.

process shall have issued, and of every attesting witness to such bill of sale, be filed with the officer acting as clerk of the docquets and judgments in the Court of Queen's Bench, within 21 days after the making or giving such bill of sale (in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed), otherwise such bill of sale shall as against all assignees of the estate and effects of the person whose goods or any of them are comprised in such bill of sale, under the laws relating to bankruptcy or insolvency, or under any assignment for the benefit of the creditors of such person, and as against all sheriffs' officers and other persons seizing any property or effects comprised in such bill of sale in the execution of any process of any court of law or equity authorizing the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale, which at or after the time of such bankruptcy, or of filing the insolvent's petition in such insolvency, or of the execution by the debtor of such assignment for the benefit of his creditors, or of executing such process (as the case may be), and after the expiration of the said period of 21 days, shall be in the possession or apparent possession of the person making such bill of sale, or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given, as the case may be.

The act after providing that any defeasance, or condition or declaration of trust not contained in the body of the bill of sale, shall be written on the same paper on which the bill of sale is written before filing, and after prescribing the manner of indexing, amount of fees, etc., further enacts that personal chattels shall be deemed to be in the "apparent possession" of the person making or giving the bill of sale, so long as they shall remain or be in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or as they shall be used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person.

[This Act has since been amended.]

[1] Per James, L. J., in *Ex parte* Daglish, L. R., 8 Ch. App., 1072, 1080 (1873). See, also, Waterfall v. Penistone, 6 Ell. & B., 876, 889 (1856). Apart from the interpretation clause (sec. 7) fixtures, it is said, would not be personal chattels; but for the purpose of that act they are made so by that clause. Per Blackburn, J., in Hawtry v. Butlin, L. R., 8 Q. B., 290 (1873). That act does not, however, make fixtures chattels for all purposes. Meux v. Allen, 23 W. R., 526 (1875); s. c., L. R., 7 Eng. & Ir.

With reference to this and similar statutes, it is quite [*323] *generally held that where the fixtures in question pass with and as a part of the freehold, it is unnecessary that the instrument by which they are conveyed or incumbered, should be filed as a bill of sale or chattel mortgage;[2] and as already observed at the beginning of this chapter, the mere grant of the land by the owner in fee will be sufficient to pass the fixtures as parcel thereof, unless there is something in the deed to indicate a contrary intention. So, where it is the intention of the parties, as shown by the terms of the instrument by the use of a general description of the property mortgaged, as factories, shops, etc., with all the machinery, fixtures, engines, etc., that the fixtures should pass as a part of the freehold, they will so pass and registration is unnecessary.[3] The court

App., 481. Growing crops are not personal chattels within this act. Branton v. Griffits, L. R., 1 C. P. D., 349 (1876), [affirmed (1877), 2 C. P. D., 212. *Ex parte* Payne (1879), 11 Ch. D., 539.]

[An assignment, for security, covering fixtures excluded by Section 5, from the definition of "trade machinery," does not require registration. Topham v. Greenside Fire-Brick Co. (1887), 37 Ch. D., 281.]

[Under Sec. 10 of the Nova Scotia "Bills of Sale Act," which is taken from the English "Bills of Sale Act," the expression "fixtures" has reference to such articles as, although technically called fixtures, are not made a permanent portion of the land, and may be passed from hand to hand without reference to or in any way affecting land. The statute does not have articles in view which can only be "delivered" by being forcibly detached from the land. Warner v. Don, 26 Can., 388, 392 (1896).]

[2] Potts v. New Jersey Arms Co., 17 N. J. Eq., 395, 404 (1866). See, also, cases cited in the following notes. [See, *ante*, p. *320. *Re* Yates (1888), 38 Ch. D., 112; *Re* Calvert [1898], 2 I. R., 501, 507; *Ex parte* Moore & Robinson's Banking Co. (1880), 14 Ch. D., 379.]

[The transfer of title to fixtures to the landlord by implication of law upon the expiration of the term is not within the Chattel Mortgage Act. Gray v. McLennan, 3 Man., 337, 343 (1886).]

[3] See, Potts v. New Jersey Arms Co., 17 N. J. Eq., 395, 404 (1866); Mather v. Fraser, 2 Kay & J., 536 (1856); 2 Jur. (N. S.), 900; 25 L. J., Ch., 361; 4 W. R., 387; 27 L. T., 41; The Patent Peat Co., 17 L. T. (N. S.), 69 (1867), the case of a railway affixed to the ground by means of sleepers partially buried in the ground, the rails let into the sleepers and spiked thereto; Holland v. Hodgson, L. R., 7 C. P., 328 (1872); s. c., 26 L. T. (N. S.), 709; 2 English Rep. (Moak's), 655; *Re* Dawson, Tate & Co., Ir. R., 2 Eq., 218 (1868); s. c., 16 W. R., 424; Boyd v. Shorock, L. R., 5 Eq., 72 (1867), stated, *post*, in this section. [*Re* Goldville Mfg. Co.,

will in such case infer that all such articles passed by the mere grant of the land unless in that which follows the grant of the land, there is sufficient to rebut that inference. And, though, as was observed by Wood, V. C., in Mather v. Fraser, it may have been superfluous to enumerate those articles which would have passed without any such enumeration, it cannot be said that because specific articles are expressly enumerated, they are therefore less part of the freehold or less attached to it.[4]

But where the intention of the parties as shown by the instrument of conveyance, is that the fixtures shall pass separately from the freehold, whether this intention is manifested by *appropriate words in the same instrument that conveys [*324] the freehold, or by a separate instrument, the case comes within the Bills of Sale Act, and the instrument should be filed in the appropriate office as a bill of sale.[5] So, in the case of conveyances or mortgages of leasehold interests, the intention that the fixtures should pass separately from the land may appear

118 Fed. 892, 897 (U. S. Dist. Ct., S. C., 1902), affirmed William Firth Co. v. South Carolina Loan Co., 122 Fed., 569 (U. S. C. C. A., S. C., 1903); *Re* Brooke [1894], 2 Ch., 600; *Ex parte* Moore & Robinson's Banking Co. (1880), 14 Ch. D., 379, 388; Irish Bldg. Soc. v. Mahony (1878), 10 Irish R., Law, 363; see, also, *Re* Lusty (1889), 60 Law T. R., 160.]

[4] See the cases cited in next note, *supra;* also *Ex parte* Barclay, 5 DeG. M. & G., 403 (1855).

[5] See Begbie v. Fenwick, L. R., 8 Ch. App., 1075 note (1866); s. c., 24 L. T. (N. S.), 58; 25 L. T. (N. S.), 441. (See this case stated *ante*, p. 311); Waterfall v. Penistone, 6 Ell. & B., 876 (1856); s. c., 3 Jur. (N. S.), 15; 26 L. J., Q. B., 100; 37 Eng. L. & Eq., 156; Hawtry v. Butlin, L. R., 8 Q. B., 290 (1873); s. c., 21 W. R., 633; 42 L. J., Q. B., 163; 28 L. T. (N. S.), 532; 5 English Rep. (Moak's), 241.

[Johns v. Ware [1899], 1 Ch., 359; Small v. National Provincial Bank [1894], 1 Ch., 686; *Re* Trethowan (1877), 5 Ch. D., 559; see, also, Sheldon v. Wickham, 50 N. Y. Supp., 314, 315 (1898).]

In Waterfall v. Penistone, the instrument in question purported to be in terms a bill of sale of machinery (commonly known as trade fixtures), executed by the owner of the freehold, who in the same instrument further charged his equity of redemption in the premises on which they were situated not only to secure the sum of £500, to secure which the bill of sale was executed, but also to secure the moneys secured by a former indenture. *Held*, that under the interpretation clause (sec. 7) the machinery was personal chattels, the intention of the parties appearing to be that it should pass separately from the freehold.

by the use of separate operative parts to the same instrument.[6] Where a tenant for years mortgages his term by way of under-lease, and by the same instrument mortgages his absolute interest in trade-fixtures annexed to the hereditaments subject to the term;[7] or, where the lessee demises by way of mortgage a mill and all the steam-engines, mill-gear and fixed and movable machinery to hold as to the land, mill, steam-engines, boilers and such machinery as is of the nature of fixtures for the residue of the term except the last day, and as to the movable machinery and other articles not in the nature of fixtures, absolutely, the deed containing a power of sale by the mortgagee, of the [*325] premises or any part thereof *either together or in parcels, and as to the steam-engines, boilers, fixed and movable machinery, either together with the buildings and land or separately and detached therefrom, and to make stipulations as to the removal of any property sold separately from the buildings,[8] the deeds of mortgage so far as they severally relate to the trade-fixtures, require registration under the Bills of Sale Act.

In Hawtry v. Butlin, Mellor, J., in delivering his judgment, said: "It appears that the mortgage deed contains an assignment of trade fixtures, and if they alone were conveyed, in order to secure the creditor it would be necessary to register the deed. I do not think that the deed conveying the fixtures is to be exempt from registration because it likewise creates an under-lease. I think that the mortgage deed is within the policy and the language of the interpretation clause." In the same case, Lush, J., said: "When a conveyance is made of a building in fee the instrument cannot be said to be a bill of sale requiring registration, although trade fixtures may pass as part of the building. But the present case is different. The mortgage is a demise by way of under-lease, and by virtue of the demise the lessees would at the utmost have been entitled to the fixtures for the term; but the deed assigns an absolute

[6] Begbie v. Fenwick (*supra*); Hawtry v. Butlin (*supra*). [*Ex parte* Brown (1878), 9 Ch. D., 389, 393.]

[7] Hawtry v. Butlin (*supra*). [*Re* Trethowan (1877), 5 Ch. D., 559.]

[8] *Ex parte* Daglish, L. R., 8 Ch. App., 1072 (1873); s. c., 21 W. R., 893; 42 L. J., Bank., 102; 29 L. T. (N. S.), 168; 7 English Rep. (Moak's), 562. [Followed in *Re* Eslick (1876), 4 Ch. D., 503, 507.]

interest in them to the mortgagees. It is therefore a bill of sale of personal chattels within 17 and 18 Vict., c. 36."

In *Ex parte* Daglish, James, L. J., in considering this question said: "In the case of a freeholder the freeholder has exactly the same interest in everything attached to the freehold as he has in the bricks and mortar themselves which make up the walls of the freehold. But that is not the case with respect to a tenant who has a limited interest—it does not signify what that limited interest is—in the soil and buildings, and who has besides an absolute interest, a complete and unqualified property (unqualified except as to this, that he must remove it before the end of that term) in the fixtures as distinct from the interest in the land. This interest is a thing which he can part with, a thing which his creditors can seize, and a thing *which [*326] is liable to execution as against him just as much as the chairs and tables in his house. When you once arrive at the fact that a person has the property in fixtures as distinct from their connection with and adhesion to the freehold, then they are in my opinion the very class of things which were intended to be provided for by the Bills of Sale Act. If the tenant is precluded from making a mortgage of his fixtures to one of his creditors by a bill of sale, it would be, in my opinion, a very narrow construction of the act. It would not be to further the policy of the law, but would enable ingenious conveyancers to defeat it, if we were to say that a man who could not sell the chattels, who could not give a security upon the chattels themselves by a bill of sale, could do it by demising the property, which might be held in a tenancy from year to year, to an undertenant for the whole of his term, and then demising or assigning with it the fixtures, with a power of entering at any time and seizing and selling those fixtures as distinct property. Such a construction would really make the act of Parliament almost a plaything."

In *Ex parte* Barclay,[1] the case of *Ex parte* Daglish was distinguished and explained. In *Ex parte* Barclay, J., the lessee of a public house and two cottages, who was bound by the covenants of his lease to deliver up at the expiration of his term

[1] L. R., 9 Ch. App., 576 (1874); s. c., 22 W. R., 608; 43 L. J., Bank., 137; 30 L. T. (N. S.), 479.

all fixtures, except trade fixtures, demised by way of mortgage the public house and premises and also the two cottages and appurtenances, including all the tenant's fixtures, to B. for the residue of the term except the last three days. The deed empowered the mortgagee in case of default to sell the premises thereby demised or any part thereof, either for the term thereby granted, or for the whole term granted by the original indenture of lease, and either together or in parcels, with a declaration that in case of any such sale, the mortgagor should hold the last three days of the term in trust for the purchaser. J. afterwards filed a petition for liquidation and a trustee was ap- [*327] pointed. Afterwards B. sold the public house, *with the two cottages for the remainder of the term to E., who agreed to take and pay for, at a valuation, such part of the household furniture, fixtures, etc., then on the premises, as the vendors or the trustee of J.'s property might be disposed or have a right to sell. The trade and other tenant's fixtures were accordingly valued at £170. The trustee contended that the mortgagees had no right to the value of any of the fixtures, on the ground that the mortgage deed had not been registered. The money was accordingly paid into court, and application made by B. for a declaration that the tenant's fixtures formed part of his security, and for an order for the trustee to pay him the value thereof. The Registrar dismissed the application, being of opinion that the case was governed by the decision in *Ex parte* Daglish; but on appeal the judgment of the Registrar was reversed, and it was held that the words "to sell the same either together or in parcels," only referred to the public house and the cottages, and were not intended to enable the fixtures to be sold separately from the premises, and that therefore the instrument did not require to be registered under the Bills of Sale Act. Sir G. Mellish, L. J., in delivering his opinion, said: "I think that when a lessee who has put in trade fixtures, and is, according to the ordinary law, entitled to remove those fixtures as against his landlord, mortgages the premises with the fixtures upon them, the test whether the mortgage, so far as respects the fixtures, requires to be registered under the Bills of Sale Act, is whether he gives power to the mortgagee to sever the fixtures from the premises, and to deal with

them and sell them separately. If he does, then I am of opinion, as we decided in *Ex parte* Daglish,[1] that, so far as respects the fixtures, the instrument requires to registered under the Bills of Sale Act. It had been decided in Hawtry v. Butlin,[2] affirming the decision of Vice Chancellor Malins in Begbie v. Fenwick,[3] that where a lessee makes a mortgage by way of under-lease, and then by a separate *testatum* assigns the fixtures, the assignment of the fixtures is a *bill of sale under the Bills of [*328] Sale Act. In *Ex parte* Daglish we carried the principle of that decision one step further, because in that case the premises only were demised; but then the power of sale, according to what we considered its true construction, enabled the mortgagee, if he pleased, to take possession of the premises with the fixtures, and to sever the fixtures from the premises, and sell the fixtures separately, and then although it might be said that there was no assignment of the fixtures in that case, yet there was, as we thought, a power to take possession of them as security for the debt; and by the express provisions of the Bills of Sale Act, the power to take possession of 'personal chattels,' which is construed to include fixtures, as a security for a debt, is to be considered a bill of sale within the Bills of Sale Act. But in the present case I am of opinion that, according to the true construction of this mortgage deed, the mortgagee had no power to sever the fixtures from the premises and to sell them separately, but could only sell the premises with the fixtures upon them. I agree that the words 'to sell the same either together or in parcels,' only refer to the distinction between the public house and the cottages, and were not intended to enable the fixtures to be sold separately from the premises.''

From these cases it appears that in the case of a mortgage of land with the fixtures thereon, whether the mortgagor's interest in the land is freehold, leasehold[4] or copyhold, if the

[1] L. R., 8 Ch., 1072.

[2] L. R., 8 Q. B., 290.

[3] L. R., 8 Ch., 1075 (n.).

[4] In Boyd v. Shorrock, L. R., 5 Eq., 72 (1867); s. c., 37 L. J., Ch., 144; 17 L. T. (N. S.), 197; 16 W. R., 102, it was *held*, that looms put up by a lessee for years of a cotton-mill for his own convenience during his term, and fastened to the flag pavement in the mill by nails driven through holes in the loom feet, into wooden plugs fitted into holes cut in the pavement,

though easily removable without injury to themselves or the freehold, were fixtures passing by an assignment of the "plat of land, mill, fixed machinery, and hereditaments comprised in the lease, etc., together with all and singular the looms and other machinery whether fixed or movable;" and that they passed as fixtures attached to the property during the tenant's interest therein and not as chattels by virtue of the express words; and hence that the indenture as to them did not require registration under the Bills of Sale Act. In this case Wood, V. C., said: "On the best consideration I can give to this case, having looked into the various authorities referred to, I can come to no other conclusion than that the principle enunciated in *Ex parte* Barclay [5 DeG. M. & G., 403 (1855)] is the right one. That principle, which I followed in Mather v. Fraser [2 Kay & J., 536 (1856)], seems to me to be, that if the tenant has affixed to the freehold, during his tenancy, articles in such a manner as to make it appear that during the term they are not to be removed, and that he regards them as attached to the property, according to his interest in the property, then on any dealing by him with the property to which these articles are affixed, the court would presume that he meant to deal with the property as it stood, with all these things so attached, and to pass the property in its then condition. Now the intention in this case clearly was, that everything should pass. These particular things are mentioned, but that is not the immediate contest before me. In what character do they pass? Were they intended to pass as fixtures which were attached to the property during the tenant's interest in the property, or were they assigned as chattels as to which no such intention (of attaching them) can be found to exist? The intention of the deed was to assign, in the first place, all the landlord's fixtures, and then other fixtures of some sort; the language used being, 'the looms and other machinery, whether fixed or movable.' Of course as to all the chattels which are not fixed, they would simply pass in the ordinary way, as chattels, by way of assignment, in the nature of a bill of sale, which would require registration. As to all the chattels which were affixed in the same way as in *Ex parte* Barclay, it appears to me that they were intended to pass, and did pass, with the property. The question is, whether or not the chattels were intended to be affixed during the tenant's interest, and whether he passed his interest in the property as it existed. The mortgage was not intended to be raised by a sale of the fixtures, and there could be no power in the mortgagor of removing them during the time the mortgage existed; they must continue in the mill, and in that sense they must be affixed to the mill.

"These cases, of course, have their own peculiar difficulties, but the definition, as far as it goes, given in *Ex parte* Barclay [5 DeG. M. & G., 410], really concludes the case: 'By "fixtures" we understand such things as are ordinarily affixed to the freehold for the convenience of the occupier, and which may be removed without material injury to the freehold; such will be machinery, using a generic term; and in houses, grates, cupboards, and other like things.' They are those things which an occupier has put up for his own convenience, and has also, for his own convenience,

*fixtures pass as a part of the land and for no greater [*329] interest than the mortgagor has in the land, then the instrument does not require registry as to the fixtures, because they are not *conveyed as chattels, but as a part of the realty. [*330] But if the mortgage deals with the fixtures separately from the land, as by the use of a separate *testatum;* or in any other manner the instrument manifests an intention to deal with the

during the term, or during the existence of his interest, attached to the property which he holds.'' The learned judge then proceeds to show that within this definition the looms were to be considered fixtures during the time the tenants retained an interest in the term, and deduces the conclusion that they passed with the property as fixtures. The mortgage in this case contained a power for the defendants after notice to sell all the machinery and other premises of a like nature either together with the buildings or land to or upon which the same should be fixed, or separately and detached therefrom. (See the case as reported in 37 L. J., Ch., p. 145.) And the case is therefore in direct conflict on this point with the cases hereinbefore cited, and may so far as it decides that, notwithstanding the power contained in the mortgage of selling the fixtures separately from the land, registration was not required, be considered as overruled. See Begbie v. Fenwick, L. R., 8 Ch. App., 1075 (n) (1866); Hawtry v. Butlin, L. R., 8 Q. B., 290 (1873); *Ex parte* Daglish, L. R., 8 Ch. App., 1083 (1873); *Ex parte* Barclay, L. R., 9 Ch. App., 576 (1874). See, also, Holland v. Hodgson, L. R., 7 C. P., 334 (1872). The attention of the court does not seem to have been drawn to this point, and in other respects (considering this fact as out of the case), the case is believed to be a correct exposition of the law; indeed, the case seems to have been reasoned as if the above facts did not exist, for it is stated by the court that ''the mortgage was not intended to be raised by sale of the fixtures.''

That the rule stated in the text applies to leasehold property, see, also The Patent Peat Co., 17 L. T. (N. S.), 69 (1867); *Re* Dawson, Tate & Co., Ir. R., 2 Eq., 218 (1868); s. c., 16 W. R., 424.

The case of Meux v. Allen, or Meux v. Jacobs, 23 W. R., 526 (1875); s. c., L. R., 7 Eng. & Ir. App., 481; 44 L. J., Ch., 481; 22 W. R., 609, where it was *held* by the Master of the Rolls (following *Ex parte* Daglish), that, where a lessee demised by way of mortgage a leasehold public house to his brewers for the residue of his term except the last day, the instrument as regards trade fixtures included in the demise of the premises to which they were attached, the trade fixtures not being mentioned in such demise but passing by operation of law as affixed to the premises, required registration under the Bills of Sale Act, seems clearly erroneous. See, also, Brown, Fixt. (3d ed.), § 171, D.

[See Warner v. Don, 26 Can., 388 (1896), affirming Don v. Warner, 28 Nova S., 202, 204 (1896), where the Nova Scotia act copies the English ''Bills of Sale Act.'']

fixtures separately from and as disconnected with the land; or if, while only a limited interest in the land is conveyed, an absolute interest in the fixtures is conveyed, or there is a power to sever the fixtures from the land, and to sell them for an absolute interest extending beyond the interest of the mortgagor in the land with which they are connected, then as to the fixtures the instrument comes within the Bills of Sale Act and must be registered. In the cases last mentioned, the creating an absolute interest in, or power to sever the fixtures and sell them for an absolute interest extending beyond the interest of the [*331] *mortgagor in the land, besides coming within the policy of the act, manifests an intention as to such excess of interest in, or power over the fixtures, to deal with them as personal chattels separately from the land, which, of course, comes within the meaning of the act.

But where the power to dispose of the fixtures is only to sell them as connected with the land and as parcel thereof, and for no greater interest than the mortgagor has in the land, as in the case of *Ex parte* Barclay, then no registration is required.

However, as respects those articles sometimes though improperly called fixtures, which even while in a *quasi* connection with the land remain mere chattels not passing with the land to the heir or grantee, registration would seem to be as necessary as in the case of any other chattels.

In the United States this subject does not seem to have been much considered by the courts except in questions between purchasers (with or without notice) of the land whereon the fixtures are situated, and chattel mortgages, etc., of the fixtures, a subject which has already been treated in this chapter. It has, however, been held that a building erected by a tenant in part for trade purposes and therefore held removable by him as against his landlord, is personal property, and hence subject to all the rules of personalty as to the recording of liens on chattels; and therefore, that where a lease provided that all unpaid rents and taxes should be a special lien upon all improvements and buildings which might be erected upon the premises, and that no such improvements or buildings should be removed from said premises while any rents which should have become due were unpaid, or any taxes remained unpaid

upon the same, which lease was not put upon record, it could not affect the rights of one taking without notice a chattel mortgage upon a building subsequently erected, which mortgage had been duly recorded, such mortgagee securing by his mortgage a lien upon the building and an equity superior to the claim of the lessor under the provisions of the lease.[1]

[1] Lanphere v. Lowe, 3 Neb., 131 (1873). The court, however, in arriving at this conclusion, also relied upon the fact that the provision in question was not a contract between landlord and tenant whereby they mutually agreed that the tenant should erect certain buildings, and that the landlord should have an interest in them to the extent of all unpaid rent and taxes, but an effort on the part of the landlord to create a lien, somewhat in the nature of a chattel mortgage, upon a something not *in esse*, and that a valid charge cannot be made upon a thing not in existence. If the building in this case, which was erected for a dwelling and house of trade and set on blocks without a cellar or foundation, is to be considered as a trade fixture, and not a mere ordinary chattel in every respect, the decision of the court seems opposed to the weight of authority, both in England and the United States, as it certainly is by the clear weight of English authority, where trade fixtures are considered while annexed as in many respects parcel of the realty. See the cases cited in this and the succeeding section. The case seems in other respects somewhat unsatisfactory. [See Booth v. Oliver, 67 Mich., 664, 669 (1888).]

But where the owner of real estate perpetually leased the same, together with the factory and buildings thereon, and all the machinery, fixtures, appurtenances and utensils belonging to said factory, reserving in the deed of lease a lien upon the demised premises and the improvements thereon for the purchase money and rents, but with liberty to the lessee at any time to remove at pleasure any portion of the machinery, upon condition that he should at the time of removal substitute other machinery in its place, of equal or greater value. *Held*, that as between the parties the property demised was to be regarded as a unit and the machinery, etc., as appurtenant to and forming a part of the real estate; and that to the extent of the reservation the property never passed, and hence that the lien was not in legal effect a chattel mortgage requiring to be verified and filed as such; that the power to remove, etc., was a mere power to repair and not as indicating absolute ownership; and that the machinery not having been removed by the lessee, the lessor's lien was superior to attaching creditors of lessee. Metcalf v. Fosdick, 23 Ohio St., 114 (1872). [See Church v. Lapham, 94 App., 550 (N. Y., 1904).]

[A lease reserving a lien by the lessor unless recorded as a chattel mortgage, will not, under the statute, affect a mortgagee of the leasehold, as to structures erected by the lessee. First Nat. Bank v. Adam, 138 Ill., 483 (1891).]

[In California, under the Civil Code, a mortgage of land together "with

[*332] V. BANKRUPTCY, ETC.

The various statutes on the subject of bankruptcy have given occasion to numerous cases respecting fixtures, depending on the peculiar nature and qualities of this kind of property.

The 11th section of the Statute, 21 James I, c. 19 (*anno* 1623), under which the earlier of these cases arose, with the recital preceding it is as follows: "And for that it often falls out, that many persons before they become bankrupts, do convey their goods to other men upon good consideration, yet still do keep the same, and are reputed the owners thereof, and dispose the same as their own.

the rents, issues and profits thereof," must be recorded as a chattel mortgage to be valid as against a subsequent chattel mortgagee of the growing crops. Simpson v. Ferguson, 112 Cal., 180 (1896).]

[Where a landowner built a railroad upon his land and entered into a contract of sale thereof with a licensee of the land, the landowner reserving title in the railroad until fully paid for, such railroad is not goods and chattels within a statute requiring such contracts to be recorded in order to be valid as against creditors of the buyer. Webster Lumber Co. v. Keystone Lumber Co., 51 W. Va., 545 (1902).]

[Where, by contract, a lien is given to a grantor of land by his grantee upon fixtures to be erected by the grantee, said contract not being recorded, the grantor has no priority by claiming an interest in realty as against subsequent *bona fide* chattel mortgagees. St. Joseph Co. v. Wilson, 133 Ind., 465 (1892).]

[A mortgage of a leasehold including a building which the lessee has the right to remove, is a mortgage of realty. McLeod v. Barnum, 131 Cal., 605, 606 (1901).]

[A shop, which a tenant at will has the right to remove, is properly mortgaged as realty. Stafford v. Adair, 57 Vt., 63, 66 (1885).]

[Where a statute treats machinery as real estate when mortgaged with the building, a mortgage of the machinery alone, if made in good faith and as required by the statute applying to real estate, is valid as against a trustee in insolvency of the mortgagor. Morris v. Grinnell, 51 Conn., 481 (1883).]

[A grain elevator upon stone foundations set in the ground, which, by agreement, the tenant has the right to remove, is a chattel real, which, under Sec. 38, Chap. 30, Revised Statutes, is classed as real estate for the purpose of conveyance or mortgage. Knapp v. Jones, 38 Ill. App., 489 (1890), affirmed 143 Ill., 375 (1892).]

[See Gill v. Weston, 110 Pa. St., 305, 310 (1885), as to a mortgage of a leasehold with the fixtures having the same effect, by statute, as a mortgage of the freehold.]

*"XI. Be it enacted, that if at any time hereafter [*333] any person or persons shall become bankrupt, and at such time as they shall so become bankrupt shall by the consent and permission of the owner and proprietary have in their possession, order and disposition, any goods or chattels, whereof they shall be reputed owners, and take upon them the sale, alteration or disposition as owners, that in every such case the said commissioners or the greater part of them shall have power to sell and dispose the same, to and for the benefit of the creditors which shall seek relief by the said commission, as fully as any other part of the estate of the bankrupt."

This section was substantially re-enacted in the statute, 6 Geo. IV., c. 16, s. 72 (*anno*, 1825), which is as follows: "And be it enacted that if any bankrupt at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order or disposition any goods or chattels, whereof he was reputed owner, or whereof he had taken upon him the sale, alteration or disposition as owner, the commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission."

This section of 6 Geo. IV., c. 16, was in turn in 1836, in 6 W. IV., c. 14, s. 86, and this in turn in 1849, in sec. 125 of the Consolidation Act, 12 & 13 Vict., c. 106,[1] re-enacted in almost the same terms last above quoted; and these several sections are so similar in terms, that the decisions under the earlier acts may be regarded as authorities in the construction of the later.

In the construction of these acts it has very generally been held, and may be regarded as well settled, that fixtures are not goods and chattels within the meaning of said acts. The question in the majority of cases has arisen on the bankruptcy of the mortgagor of premises and fixtures who had been suffered to remain in possession of both the premises and fixtures after the execution of the mortgage. And the question in such cases has been whether the fixtures passed to the assignees as *a part of the goods and chattels of the bankrupt, or [*334] as being in his reputed ownership at the time of the bankruptcy;

[1] See, however, the Bills of Sale Act, *ante*, p. *321 note; particularly the interpretation clause (sec. 7), which changes the rule to some extent.

or whether they passed to the mortgagee as parcel of the mortgaged estate. And on this question there is no doubt whatever that fixtures, such as would otherwise pass to the mortgagee with the land as a part of his security, are not goods and chattels within said acts.[2] And the rule is the same whether the mortgage is of a freehold interest in the land,[3] or only of a leasehold.[4] So, also, though the fixtures in question are removable trade or other tenant's fixtures.[5]

A distinction has, however, been taken by some of the judges [*335] of the English courts of bankruptcy between trade *fixtures erected by a tenant and removable by him without damage to the freehold, and similar annexations made by the owner

[2] Ryall v. Rolle, 1 Atk., 165 (1749); s. c., 1 Ves. Sr., 348, 375, on further directions; the articles in this case were described as coppers and utensils fixt, which, together with his house, etc., were demised by a brewer by way of mortgage, he remaining in possession till his bankruptcy; Fletcher v. Manning, 1 C. & K., 350 (1844), mill-machinery; Rufford v. Bishop, 5 Russ., 346 (1829); s. c., 7 L. J., Ch. 108; Pim v. Grazebrook, 4 Scott's N. R., 565 (1842). See, also, *Ex parte* Acton, 4 L. T. (N. S.), 261 (1861); Hitchman v. Walton, 4 M. & W., 409, 414 (1838).

[3] *Ex parte* Cotton, 2 Mont. Dea. & DeG., 725 (1842); s. c., 6 Jur., 1045; Cullwick v. Swindell, L. R., 3 Eq., 249 (1866); s. c., 36 L. J., Ch., 173; 15 W. R., 216; *Ex parte* Scarth, 1 Mont. Dea. & DeG., 240 (1840); s. c., 9 L. J. (N. S.), Bank., 35; Hubbard v. Bagshaw, 4 Sim., 326 (1831); 9 L. J. Chanc., 190.

[4] *Ex parte* Belcher, 2 Mont. & Ayr., 160 (1835); s. c., 4 Dea. & Chit., 703; 4 L. J. (N. S.), Bank, where the owner in fee mortgaged for a term of years, but remained in possession, annexed fixtures removable as between landlord and tenant, but which were held to pass to mortgagee; Clark v. Crownshaw, 3 B. & Ad., 804 (1832); Boydell v. McMichael, 1 Cr. M. & R., 177 (1834); s. c., 3 Tyrwh., 974; 3 L. J. (N. S.), Exch., 264; *Ex parte* Wilson, 2 Mont. & Ayr., 61 (1835); s. c., 4 Dea. & Chit., 143; *Ex parte* Acton, 4 L. T. (N. S.), 261 (1861); *Ex parte* Barclay, 5 DeG. M. & G., 403 (1855); s. c., 1 Jur. (N. S.), 1145; 25 L. J., Bank., 1; 35 Eng. L. & Eq., 169.

[5] See, Minshall v. Lloyd, 2 M. & W., 450 (1837); Boydell v. McMichael, 1 Cr. M. & R., 177 (1834). *Ex parte* Broadwood, 1 Mont. Dea. & DeG., 631 (1841); The Patent Peat Co., 17 L. T. (N. S.), 69 (1867); *Ex parte* Montgomery, 4 Ir. Ch., 520 (1855); *Ex parte* Bentley, 2 Mont. Dea. & DeG., 591 (1842); s. c., 6 Jur., 719; *Ex parte* Reynal, 2 Mont. Dea & DeG., 443, 461 (1841); *Ex parte* Heathcote, 2 Mont. Dea. & DeG., 711 (1842); *Ex parte* Barclay, 5 DeG. M. & G., 403 (1855); see, also, *Ex parte* Cotton, 2 Mont. Dea. & DeG., 729 (1842); *In re* Dawson, Tate & Co., Ir., R., 2 Eq., 218 (1868); s. c., 16 W. R., 424.

of the freehold to his own estate.[6] This distinction, however, does not seem to have received the support of the weight of authority either American or English.

The rule is the same, also, though the mortgage is an equitable one by deposit of title deeds or lease.[7] The reason of

[6] In *Ex parte* Austin, 1 Dea. & Chit., 207 (1832), Sir G. Rose expressed the opinion that "where fixtures are capable of removal as between landlord and tenant without injury to the freehold, they are within the order and disposition of the bankrupt." The rest of the court, however, declined to express an opinion on the point.

So, in *In re* Trevey, 14 L. T. (N. S.), 193 (1866), (Irish Court of Bankruptcy), Lynch, J., said: "But I am of opinion that this distinction" [in Minshall v. Lloyd, that trade fixtures are not goods and chattels within the bankrupt law, though such, when made so by the tenant's severance or for the benefit of execution creditors] "is not to be accepted as settled on a due consideration of the cases, and that the exception made for the benefit of trade and for the benefit of creditors, whereby removable fixtures which become changeable into the condition of chattels by the tenant himself, are held to be chattels for his creditors will be held to apply for the benefit of his general creditors, as well as for the benefit of a particular creditor who has sued him to execution. If for the benefit of creditors they are chattels, surely they ought then to be sold within this section;" citing Walmsley v. Milne, 7 C. B. (N. S.), 132 (1859). This *dictum* was not, however, necessary to the decision of the case, as the articles in question (machines kept in place only by their own weight and worked by belts) were held to be mere chattels, and hence passed to the assignee. See, also, *Ex parte* Belcher, 2 Mont. & Ayr., 167 (1835); *Ex parte* Wilson, 2 Mont. & Ayr., 70 (1835); *Ex parte* Lloyd, 1 Mont. & Ayr., 494, 506 (1834); s. c., 3 Dea. & Chit., 765; 3 L. J. (N. S.), Bank., 108; *Ex parte* King, 1 Mont. Dea. & DeG., 119 (1840); s. c., 4 Jur., 510. This was a case of a vendor's lien sought to be enforced on a house and fixtures sold with the lease. The fixtures were common tenant's fixtures. The court was equally divided as to whether the fixtures passed to the assignee.

[7] See *Ex parte* Lloyd (*supra*); *Ex parte* Wilson, 2 Mont. & Ayr., 61 (1835); s. c., 4 Dea. & Chit., 143; *Ex parte* Heathcote, 2 Mont. Dea. & DeG., 711 (1842); s. c., 6 Jur., 1001; *Ex parte* Acton, 4 L. T. (N. S.), 261 (1861); *Ex parte* Reynal, 2 Mont. Dea. & DeG., 443 (1841); *Ex parte* Barclay, 5 DeG. M. & G., 403 (1855); s. c., 1 Jur. (N. S.), 1145; 25 L. J., Bank., 1; 35 Eng. Law & Eq., 169; *Ex parte* Broadwood, 1 Mont. Dea. & DeG., 631 (1841).

In Tebb v. Hodge, L. R., 5 C. P., 73 (1869); s. c., 39 L. J., C. P., 56; 38 L. J., C. P., 217, the plaintiff agreed to let to B. certain premises which B. was to fit up forthwith as a first class luncheon-bar and restaurant, such fittings to be of the value of £500 at least, and to be completed to the satisfaction of plaintiff on a certain day (time in this respect to be of

[*336] *the rule in each of the above cases obviously is that fixtures during the time of their annexation are parcel of the realty, and hence cannot be goods and chattels.[8]

It has also been held that trade fixtures actually annexed to the land, do not pass to the assignee as being chattels within [*337] *the order and disposition of the bankrupt at the time of the bankruptcy with the consent of the true owner, though

the essence of the contract). B. was to pay £1,000 as a premium for the lease, upon payment of which, said premises being so fitted up, the plaintiff was to grant said lease and to lend or obtain for B. upon security of the premises so fitted up £1,000. It was also mutually agreed that if B. should fail to carry out any of the stipulations or conditions therein, etc., or should the premises not be fitted up in the manner and within the time specified, etc., plaintiff might re-enter. Before the lease was granted or the money paid, B. became bankrupt and his assignee seized and sold the fittings and fixtures under order of the Court of Bankruptcy: *Held*, that until the lease was executed the agreement was to be a security to the plaintiff for all that he was entitled under it, that plaintiff became the equitable mortgagee of the premises with the fittings and fixtures, that defendants had no right to sell them under the adjudication in bankruptcy, and that the fixtures were not goods and chattels in the order and disposition of the bankrupt with the consent of the true owner thereof within sec. 125 of Bankrupt Consolidation Act of 1849.

So, in *Ex parte* Thompson, 8 Jur., 633 (1844); s. c., 13 L. J., Ch., 354, A., by a written memorandum, made an equitable mortgage to B. of premises held by A. under a lease for a term of years (to secure the renewal of which the lessor had executed a penal bond to the lessees), including certain fixtures belonging to A. The term having expired, A. occupied for a time as tenant from year to year, and then, a negotiation taking place for a renewal of the lease, the old lease was delivered over to the agent of the lessor under the agreement that any new lease to be executed should be deposited with B. as a continuing security, and a counterpart of such new lease executed by A. was delivered to B. upon an undertaking that the new lease when delivered by the lessor should be deposited with him, B. But before such new lease was delivered over by the lessor, A. became bankrupt, and the lease became forfeited. A. was in possession of the fixtures which were sold by his assignees: *Held*, that whatever interest the lessee had during his tenancy from year to year was in equity the interest of B., and was sufficient to maintain his lien upon the fixtures, which were a part of that interest, and that the assignees had no right to the fixtures.

[8] Boydell v. McMichael (*supra*); *Ex parte* Montgomery (*supra*); Horn v. Baker, 9 East, 215 (1808). See, however, another ground stated in *Ex parte* Lloyd, 3 Dea. & Chit., 765 (1834); s. c., 1 Mont. and Ayr., 494; 3 L. J. (N. S.), Bank., 108, per Erskine, C. J.

they have been mortgaged separately from the leasehold interest of the mortgagor in the land, and thereby constructively severed and converted into personalty.[9] However in *Ex parte* Sykes,[10] the petition of the mortgagee to have the benefit of his security in such a case, was dismissed with costs by Sir Knight Bruce, V. C., upon the mortgagee's declining to file a bill to try the question, the V. C. observing that he was unwilling in the jurisdiction in bankruptcy to extend the rule relating to order and disposition; and the question does not seem to be settled.

The rule is the same also where the question arises between other parties than the mortgagee and the assignee in bankruptcy of the mortgagor. Thus, in the case of Horn v. Baker,[11] which is a leading case in this branch of the law of fixtures, the question arose between the lessor of the bankrupts and their assignees in bankruptcy. In that case certain stills and vats which had formerly belonged to the firm of which the lessor and one of the bankrupts were members, were leased together with a distill-house to the bankrupts (successors of the firm above mentioned), for a term, with liberty to the lessees to purchase on the death of the lessor and his wife; the lessees afterwards became bankrupt while yet in possession of the stills and vats, and upon an action being brought against the *as- [*338] signees who had seized and sold the articles in question as part of the estate of the bankrupts it was held that the stills, which were fixed to the freehold, being set in brick-work and let into

[9] Whitmore v. Empson, 23 Beav., 313 (1856); s. c., 3 Jur. (N. S.), 230; 26 L. J., Chanc., 364; 5 W. R., 217; 28 L. T., 300. See, also, *Ex parte* Spicer, 2 Deac., 335 (1837).

[10] 18 L. J. (N. S.), Bank., 16 (1849); s. c., 13 Jur., 486.

See, also, Trappes v. Harter, 2 Cr. & M., 153 (1833); s. c., 3 Tyrwh., 603; 3 L. J. (N. S.), Exch., 24, where it was held that by the terms of the mortgage deed it was not intended that the fixtures should pass with the land, and having been treated by all the parties as personalty they passed to the assignee as part of the personal estate of the bankrupt. See, also, Trappes v. Harter, explained in *Ex parte* Barclay, 5 DeG. M. & G., 403, 413, 414 (1855), where it is stated that the order and disposition clause of the statute does not apply to the case of a bankrupt in possession of his own goods, but is confined to the case of a person in possession of the goods of another.

[11] 9 East, 215 (1808). See, *ante*, p. *12. This case was decided upon the authority of Ryall v. Rolle, 1 Atk., 165 (1749).

the ground, were not goods and chattels in the reputed ownership of the bankrupts within the Statute, 21 Jac. I, c. 19, sec. 10 & 11; but that movable articles not fixed passed to the assignees. In delivering the judgment Lord Ellenborough observed that, "the true object of the Statute 21 Jac. I, c. 19, s. 10 & 11, was to make the reputed ownership of goods and chattels in the possession of bankrupts at the time of their bankruptcy, the real ownership of such goods and chattels, and to subject them to all the debts of the bankrupt; considering that such reputed ownership would draw after it the real sale, order, alteration and disposition of the goods; that the stills, as it appeared, were fixed to the freehold, and as such would not pass to the bankrupt's assignees under the description of goods and chattels in the Statute. But, that as to the vats and utensils [which were in no way annexed to the freehold],[12] there was

[12] To the point that movable machinery and other articles not annexed to the realty pass to the assignees, see, also, *Re* Trevey, 14 L. T. (N. S.), 193 (1866); Shuttleworth v. Hernaman, 1 DeG. & J., 322 (1857); s. c., 3 Jur. (N. S.), 1313; 26 L. J., Bank., 61; Lingham v. Biggs, 1 B. & P., 82 (1797); Bryson v. Wylie, Id., 83 (note); *Ex parte* Newbery, 1 Lowell's Dec., 386 (1869); *Ex parte* Astbury, L. R., 4 Ch. App., 630 (1869); Whitmore v. Empson, 23 Beav., 313 (1857). See, however, the case of constructive annexation referred to, *post*, in this chapter.

[A builder entered into an agreement with a freeholder to erect houses, which provided that the builder was to be deemed a tenant at will; that all materials and plant brought upon the premises were to be deemed annexed to the freehold. Held, as between the freeholder and the trustee in bankruptcy of the builder, the latter was entitled to any plant and materials which had not become a part of the houses at the date of the bankruptcy. *Re* Weibking [1902], 1 K. B., 713, 718.]

[A signboard of an inn, fastened by a screw to the wall, being valuable because painted by a celebrated artist, and which had been moved to different parts of the premises, was held not to pass to the assignee as against the freeholder. *Ex parte* D'Eresby (1881), 44 L. T. R., 781, reversing *Ex parte* Sheen (1881), 43 L. T. R., 638, and affirming *Ex parte* D'Eresby (1880), 22 Alb. Law J., 382.]

[A contract was made to erect two petroleum tanks, twenty-six feet deep and forty feet in diameter, upon a wharf. They were built of steel plates upon a concrete foundation, though not attached thereto, but could not be moved without taking them to pieces. Before the tanks were completed, the buyer became insolvent, and a receiver was appointed. *Held*, that the tanks were not fixtures; and, while incomplete, the property therein remained in the seller. Bellamy v. Davey [1891], 3 Ch., 540.]

nothing in the case to rebut the reputed ownership following the possession of the bankrupts after the dissolution of the old firm, when the business was continued to be carried on by the bankrupts alone in the same manner as it followed the possession of the antecedent partnership when the trade was carried on by John, Robert and Wm. Horn.[13]

*The case of Horn v. Baker has been generally regarded [*339] as the leading authority for the rule, that fixtures during their annexation are not goods and chattels within the meaning of the bankrupt law, not only in questions arising between parties sustaining the same relations as the parties in that case, but also in cases where the parties sustained different relations.[14] It has been held in subsequent cases that the law of reputed ownership is not applicable to fixtures, the property of the landlord, let with the premises to a tenant who becomes bankrupt while in possession thereof.[15] So, where the lease contains

[13] With reference to this subject of reputed ownership, Lord Ellenborough in the same case observed: "If as in some manufactories, where the engines necessary for carrying on the business are known to be let out to the several manufacturers employed upon them, there had been a known usage in this trade for distillers to rent or hire the vats and other articles used by them for the purpose of distilling, the possession and use of such articles would not in such case have carried the reputed ownership. But in the absence of such usage, there is nothing stated in the case which qualifies the reputed ownership arising out of the possession and use of the things in their trade. The world would naturally give credit to the traders on their reputed property, and the person who permitted them to hold out to the world the appearance of their being the real owners, ought to be answerable for the consequences, and was so intended to be by the Statute." See, also, Rufford v. Bishop, 5 Russ., 346, 359 (1829); s. c., 7 L. J., Ch., 108, 114; Storer v. Hunter, 3 B. & C., 368 (1824), explained by Parke, J., in Coombs v. Beaumont, 5 B. & Ad., 72, 76 (1833).

In some of the cases last above cited, the existence of a custom as to demising fixtures together with the premises, is referred to by the judges in terms indicating that some reliance was placed thereon in forming their judgments. Independently, however, of that question, the rule in the absence of legislation specially affecting the question, seems to be well founded upon the nature of the things themselves during their annexation as being parcel, or in the nature of, the realty, and hence not goods and chattels within the meaning of the statute.

[14] See, generally, the cases cited in this section.

[15] *Re* Head, 12 W. R., 215 (1864); s. c., 9 L. T. (N. S.), 613; *Ex parte* Newbery, 10 L. T. (N. S.), 661 (1864); Coombs v. Beaumont, 5 B. & Ad.,

a stipulation giving the tenant the right to remove trade fixtures at the end of the term, provided the lessee should have kept all his covenants, but otherwise not, and that none of them should be removed during the term without the consent of the lessor, such trade fixtures can be removed by the assignee in bankruptcy of the tenant only upon payment of arrears of rent. Such a lien is valid, the act of affixing the articles in ques- [*340] tion to the freehold taking them out of the *category of chattels and being notice to creditors and to all the world that the right of removal will depend on the contract between landlord and tenant.[16]

Between the vendor of land by executory contract and the assignee in bankruptcy of the vendee, few cases seem to have arisen. No reason is perceived, however, why the rule as applied between the mortgagee and the assignee, is not equally applicable to this relation. In the case of Parsons v. Hind,[17] the plaintiff, who was the owner of a factory, contracted to sell it to K., who entered into possession of the premises. There was, however, no conveyance made, nor payment of the purchase money; and K. afterwards becoming bankrupt, his assignee elected not to adopt the contract to purchase the factory. The assignee, however, sold the hydraulic press in question to defendants, who upon the plaintiff's refusing to allow its removal, broke into the factory and removed it. The press was mortared to

72 (1833); s. c., 2 Nev. & Man., 235; 2 L. J. (N. S.), K. B., 190, where a steam engine erected for the purpose of working a colliery, to be used by the lessee of the colliery during his term, but to be held as the property of the landlord subject to such use, was held not to pass to the assignee of the tenant upon his bankruptcy. [*Ex parte* D'Eresby (1881), 44 L. T. R., 781, reversing *Ex parte* Sheen (1881), 43 L. T. R., 638, and affirming *Ex parte* D'Eresby (1880), 22 Alb. Law J., 382.]

[16] *Ex parte* Morrow, 1 Lowell's Dec., 386 (1869); s. c., 2 N. B. R. (2d ed.), 665.

See, also, Storer v. Hunter, 3 B. & C., 368 (1824), where the tenant had only a qualified right of user during the term, the lease containing a covenant to deliver up the machinery, etc., used with the colliery, and a provision for a valuation before the determination of the term, and that the difference between such valuation and the inventory and valuation at the commencement of the term, should be paid by the landlord or tenant to the other according as it was greater or less than the value at the time of the letting.

[17] 14 W. R., 860 (1866).

the floor of the factory, but was not essential to the carrying on of the factory, nor annexed to improve the premises, but was merely an additional convenience brought into the factory for temporary uses and was so fixed in order to render it steady and for its more convenient use. Upon an action brought against the defendants to recover damages for the conversion of said press, it was held by the Court of Queen's Bench that said press never was a part of the freehold, but was always a mere chattel, and therefore belonged to the assignee. Had the annexation been made *perpetui usus causa*, and not for a mere temporary purpose, the decision must evidently have been otherwise.[18]

*The rule applies also to fixtures not actually, but only [*341] constructively annexed to the realty. Thus, it is held that an upper mill-stone affixed in the usual way by the owner of the inheritance after the execution of a mortgage, though not actually annexed to the freehold, is yet essentially parcel of the mill and passes to the mortgagee as against the assignee in bankruptcy of the mortgagor.[19] The same rule is applicable to the case of keys, doors, and other recognized instances of constructive annexation.

So, articles which, though loose, have been disconnected without leave or the knowledge of the mortgagee, follow, as it seems, the rule applicable to fixtures in a state of annexation; for they cannot be considered in the order and disposition of the bankrupts with the consent of the true owner.[20]

Independently of the construction put upon the words "goods

[18] See, also, *Ex parte* Watkins, 1 Deac., 296 (1835), a case between vendor and the assignee of the vendee, which, however, was decided without reference to the question whether the fixtures were or were not goods and chattels, the bankrupt not being in possession thereof at the time of his committing the act of bankruptcy; *Ex parte* King, 1 Mont. Dea. & DeG., 119 (1840); s. c., 4 Jur., 510.

[19] Walmsley v. Milne, 7 C. B. (N. S.), 115 (1859); s. c., 6 Jur. (N. S.), 125; 29 L. J., C. P., 97; 1 L. T. (N. S.), 62; 8 Am. Law Reg., 373. [See, *ante*, p. *301.]

See, also, *Ex parte* Astbury, L. R., 4 Ch. App., 630 (1869); s. c., 38 L. J., Bank., 9; 20 L. T. (N. S.), 997; 17 W. R. 997, where the same rule was applied as to the iron rolls (including duplicates) of a rolling mill; also as to straightening plates laid on brickwork and bedded in earth.

[20] Per Holroyd, Com'r in *Ex parte* Reynal, 2 Mont. Dea. & DeG., 443, 448 (1841).

and chattels" in the statutes relating to bankruptcy, property affixed to the freehold is said not to be within the intent of the acts; because the possession of such property does not create a visible ownership in the bankrupt, so as to procure him unmerited credit. For creditors are not deceived by the possession of property of this description; and it differs from the case of personal goods, where the possession and power of disposal are the only evidence of ownership to which a creditor can look.[21]

[*342] *Questions have also been raised respecting the legality of the mortgagor's retaining possession of the fixtures after the execution of a mortgage upon the land to which they are annexed, on the ground that the fixtures are to be regarded as in the nature of personal chattels, and hence keeping possession of them after a conveyance, is to be deemed inconsistent with the deed, and evidence of fraud.[22] It seems, however, to be settled, that fixtures so far partake of the nature of realty, that the keeping possession of them with the land after an assignment will not avoid the conveyance on the ground of fraud; and that in this respect a mortgage or sale of property annexed to the realty, is to be distinguished from one of mere chattels in a state of severance therefrom.[23]

[21] Ferard on Fixt., 239, *et seq.*, citing Steward v. Lombe, 1 Brod. & B., 511 (1820), per Dallas, C. J.; Rufford v. Bishop, 5 Russ., 346 (1829); Hubbard v. Bagshaw, 4 Sim., 326 (1831). See, also, Boydell v. McMichael, 1 Cr. M. & R., 179 (1834), per Parke, B.; Ryall v. Rolle, 1 Atk., 165, 168 (1749).

[22] See, generally, Statute 13 Eliz., ch. 5 (*anno*, 1570); Twyne's Case., 3 Co., 80 (1602); Edwards v. Harben, 2 Term, 587 (1788); Reid v. Blades, 5 Taunt., 212 (1813); Bryson v. Wylie, 1 B. & P., 83, note (1784); Eastwood v. Brown, 1 Ry. & M., 312 (1825); 1 Smith's Lead. Cas., 33, 39, *et seq.*, where the cases are fully collected; also, *Ex parte* Quincy, 1 Atk., 477 (1750), where Lord Hardwicke stated that there would have been a difficulty in the possession of the mortgagor, had it not otherwise have been cleared up by an express agreement between the parties that the mortgagor should not be prevented from coming in the brew-house.

[23] See Ryall v. Rolle, 1 Atk., 165 (1749); s. c., 1 Ves., 348, 375; Steward v. Lombe, 1 Brod. & B., 506 (1820); s. c., 4 Moore, 281; Ferard on Fixt., 230; Strauss v. Davy, 15 Leg. Int., 139 (1858); s. c., 3 Phila. Rep., 137; Knight v. The Bank, 15 Leg. Int., 139 (1858); s. c., 3 Phila. Rep., 138.

VI. Of the Sale of Fixtures as Affected by the Statute of Frauds.[24]

It has already been seen from the various cases already cited, that fixtures, whether erected by the owner of the fee or by the owner of a less interest in the land, may be sold or mortgaged either in connection with or separately from the land.

It remains to be considered whether contracts relating to *the sale of fixtures are embraced within the provisions [*343] of the Statute of Frauds.

Where the contract relates to the transfer of fixtures together with the land, the contract being an entire one, it clearly comes within the 4th section of the Statute; and in such a case any agreement for the sale, valuation, etc., of the fixtures, though it may be of a chattel interest only, must be in writing and executed according to the formalities required by the Statute.[25]

It appears, however, to be settled, that a sale of removable trade or other tenant's fixtures, separately from the land, does not come within the 4th section of the Statute as being a sale of an interest in land.[26] And some cases even go so far as to

[24] The Statute of Frauds will also be found further considered in the chapter upon Emblements (chap. 8).

[25] Ferard Fixt., 253; Vaughn v. Hancock, 3 C. B., 766 (1846); s. c., 10 Jur., 926; 16 L. J., C. P., 1. [See Stone v. Thaden, 10 N. Y. Supp., 236, 237 (1890); Jarvis v. Jarvis (1893), 1 Manson's Bankr. Cas., 199, 201.]

See, also, Mechelen v. Wallace, 7 Ad. & E., 49 (1837), holding an agreement for a house and furniture, the breach being assigned as to the furniture, to be an entire and inseparable contract and within the Statute of Frauds; Kelly v. Webster, *post* in this section.

[26] Hallen v. Runder, 3 Tyrwh., 959 (1834); s. c., 1 Cr. M. & R., 266; 3 L. J. (N. S.), Exch., 260; Petrie v. Dawson, 2 C. & K., 138 (1845); Lee v. Gaskell, 45 L. J., Q. B. D., 540 (1876). See, also, Ross's Appeal, 9 Penn. St., 491 (1848). [Webster v. Nichols, 104 Ill., 160, 174 (1882); Oswald v. Whitman, 22 Nova S., 13, 16 (1889); Malmsbury Min. Co. v. Tucker, 3 Vict. L. R. (Law), 213, 221 (1877); see, also, Apolo v. Kauo, 7 Hawaii, 755, 756 (1889); Kehlor v. Wilton, 99 Ill. App., 228, 230 (1901).]

[The rule is the same as to buildings owned by licensees upon the land of others. Commonwealth v. Wesley, 166 Mass., 248, 252 (1896); Ford v. Burleigh, 62 N. H., 388, 392 (1882); School District v. Milligan, 88 Pa. St., 96 (1878); although in McKenzie v. McDonald, 2 Nova S., Dec., 11, 12 (1869), it is said that a building is *prima facie* a part of the realty

hold that a sale of fixtures by the owner of the freehold, with a view to their severance from the soil, may be made by parol.[27] It is well settled that a parol promise to pay for the improvements made upon land in the possession of another, the agree- [*344] *ment being substantially to pay for labor bestowed upon land under the denomination of improvements, if founded upon a sufficient consideration, is valid; and is not within the

and within the Statute of Frauds, although neither the vendor nor the vendee claim title to the land.]

[In Washband v. Washband, 24 Conn., 500 (1856), a son built a plaster mill upon his father's land at his own expense under a verbal agreement that he might own and use it. The father, upon a division of his estate among his children, deeded the land, upon which the mill stood, to another son, at which time the latter bought the mill from the builder, giving his promissory note therefor. When sued upon the note, the maker claimed want of consideration, insisting that the mill was a part of the freehold, and the sale was not in writing. *Held,* that the mill belonged to the builder, and his sale to his brother was valid.]

[27] Bostwick v. Leach, 3 Day, 476 (1809); Foster v. Mabe, 4 Ala., 402 (1842); Strong v. Doyle, 110 Mass., 92 (1872), per Colt, J. See also Scoggin v. Slater, 22 Ala., 687 (1853); Marshall v. Green and other cases cited *ante,* chap. 8, p. *268. [Rogers v. Cox, 96 Ind., 157, 159 (1884); Tyson v. Post, 108 N. Y., 217, 221 (1888), affirming 22 N. Y. Wkly. Dig., 492 (Supr. Ct., 1885); Moody v. Aiken, 50 Tex., 65 (1878).]

[Where a frame building is sold by the owner of the land upon which it is situated, and the manner of annexation is not shown, the fair inference is that it is not permanently annexed. Rogers v. Cox, 96 Ind., 157, 160 (1884). And in Long v. White, 42 Ohio St., 59, 61 (1884), it is said: "In applying the statute of frauds, buildings are not classed with forest trees, but with growing crops, nursery trees, and fixtures attached to the realty."]

[An unwritten partition of a line fence by the owners of the contiguous lands, is valid. Ivins v. Ackerson, 38 N. J. Law, 220, 222 (1876).]

[A sale of ice is not realty within the Statute of Frauds. It gains no nourishment nor support from the soil. It has no value except as taken away and kept in a solid state. Higgins v. Kusterer, 41 Mich., 318 (1879).]

If fixtures annexed by the owner of the freehold, during annexation partake of the nature of realty and pass with the land to the heir or to the vendee of the land, as it is well settled they do, a sale of them by parol whether with a view of immediate severance or not, seems the sale of an interest in or concerning land within the Statute. See the subject considered with reference to growing trees, etc., in chap. 8, p. *268. See also Landon v. Platt, 34 Conn., 517, 523 (1868). In Meyers v. Schemp, 67 Ill., 469 (1873), where the owner of a brick building which had been destroyed

Statute of Frauds.[28] But a contract for the sale and delivery of the possession of land, as well as the improvements thereon, is within the Statute, possession being *prima facie* evidence of title and an interest in land within the Statute.[29]

As to whether fixtures, while annexed to the land, may be by parol excepted from the operation of a deed conveying the land upon which they are situated, there is a conflict of authority. If fixtures, while annexed, are to be considered as partaking of the nature of the realty, which clearly is the case where annexed by the owner of the freehold, the better opinion seems

by fire verbally sold the brick, some of which had been severed by the fire, but the main portion of which remained in the walls as it was before the fire, it was *held*, that the brick in the walls being realty and the sale being an entirety, it was within the Statute of Frauds.

[A contract of sale of shelving and drawers in a store by the owner of the realty, must be in writing and executed with the same formality as the conveyance of any other realty. Johnston v. Phila. Mort. Co., 129 Ala., 515, 521 (1900). A sale of permanent fixtures by the owner of the land to which they are annexed, can not be made by parol. Brown v. Roland, 92 Tex., 54, 57 (1898), overruling 11 Tex. Civ. App., 648, 650 (1895). A parol sale of a sugar mill by the owner is void. Hutchins v. Masterson, 46 Tex., 551, 555 (1877).]

[28] Frear v. Hardenbergh, 5 John., 272 (1810); Benedict v. Beebee, 11 John., 145 (1814); Lower v. Winters, 7 Cow., 263 (1827); Scoggin v. Slater, 22 Ala., 687 (1853); Cassell v. Collins, 23 Ala., 676 (1853).

[A contract by which the owner of land, upon which stood a barn, was to take down the barn, and another party was to draw the timber to his land where the barn was to be erected, is not within the Statute of Frauds, although the barn as it stood was a part of the realty, as it was to be changed to personalty before anything was to be done by the other party. Scales v. Wiley, 68 Vt., 39, 41 (1895).]

[An oral partition of a line fence, in order to assign to each landowner his share thereof for the purpose of maintainance, is not within the Statute. Ivins v. Ackerson, 38 N. J. Law, 220, 222 (1876).]

[29] Howard v. Easton, 7 John., 205 (1810); Kelly v. Webster, 12 C. B., 283 (1852); s. c., 16 Jur., 838; 21 L. J., C. P., 163; 10 Eng. L. & Eq., 517, which was a contract by a tenant to give immediate possession to a third party who was to pay him a certain sum for such possession and as compensation for improvements, fixtures, etc. See, also, Cocking v. Ward, 1 C. B., 858 (1845).

[A contract of sale of the "building materials" of a standing house, under a condition that the purchaser is to take possession of the premises for the purpose of removing such materials, is within the fourth section of the Statute of Frauds. Lavery v. Purcell (1888), 39 Ch. D., 508, 517.]

clearly to be, that a sale and conveyance of the real estate will (there being no exception in the deed of conveyance) pass the fixtures thereto annexed, notwithstanding a parol exception thereof at the time of such sale, not only because such parol exception is within the Statute of Frauds, but also because to admit parol evidence thereof, would contravene the rule that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument.[30] For the same [*345] reason parol testimony is inadmis*sible to annex to, and include in, a sale of land any subject-matter not legally appertaining thereto or a parcel thereof.[31]

A sale of a tenant's fixtures while annexed, is considered not

[30] Bond v. Coke, 71 N. C., 97 (1874), a cotton-gin and press-fixtures; Noble v. Bosworth, 19 Pick., 314 (1837); Detroit, etc., R. R. Co. v. Forbes, 30 Mich., 166 (1874); Conner v. Coffin, 22 N. H., 538 (1851), parol reservation of manure on a farm, void. See, also, Latham v. Blakely, 70 N. C., 368 (1874).

Contra, Pea v. Pea, 35 Ind., 387 (1871); Frederick v. Devol, 15 Ind., 357 (1860); Strong v. Doyle, 110 Mass., 92 (1872), where the separate agreement related to manure on the farm sold.

See the subject considered with reference to growing crops, etc., *ante,* chap. 8, p. *252.

[The following cases sustain the text: Towson v. Smith, 13 App., D. C., 48, 58 (1898); VanHusen v. Omaha B. & T. R'y Co., 118 Iowa, 366, 379 (1902); Leonard v. Clough, 133 N. Y., 292, 296 (1892); Brown v. Roland, 92 Tex., 54, 57 (1898); *re* Perkins' Est., 26 Atl., 637 (Vt., 1893).]

[Where there is a conveyance of land by deed, containing no reservations as to the buildings, an understanding that the vendor retains the ownership of the houses thereon, with the right to remove them, can not be shown by parol; but a parol agreement as to a gin may be shown. Smith v. Odom, 63 Ga., 499, 502 (1879).]

[Where, at the time of the execution of a mortgage upon land, both parties agreed that a third person, advancing money for part payment, should have a marine railway thereon, this agreement, although oral, can be shown by such third person, even though it contradicts the mortgage, as the third person is not a party to the written instrument. Tyson v. Post, 108 N. Y., 217, 221 (1888), affirming 22 N. Y. Wkly. Dig., 492 (Supr. Ct., 1885).]

[31] McLaughlin v. Johnson, 46 Ill., 163 (1867); Ripley v. Page, 12 Vt., 353 (1839), both of which cases related to rails lying on the ground. [Seedhouse v. Broward, 34 Fla., 509, 524 (1894); see, also, Nesmith v. Martin, 75 Pac., 590, 592 (Colo., 1904). But parol evidence is proper to show what articles are covered by an expression used in a deed. Bagley v. Rose Hill Sugar Co., 111 La., 249 (1903).]

to be a sale of goods, wares, and merchandise within the 17th section of the Statute of Frauds, though the point does not seem to have been very extensively discussed.[32]

VII. Stamp Acts as Relating to Fixtures.

No decisions upon this particular subject appear ever to have been made in this country; but the subject has been considered by the English courts in a number of instances. Thus it has been held in an action on an agreement for the sale of fixtures by an outgoing to an incoming tenant, that fixtures are not "goods, wares, or merchandise," within the exception of the Stamp Act, 55 Geo. III., c. 184.[33] Where an instrument containing a present demise of a house, contains also a contract for the purchase of fixtures, it cannot be given in evidence to prove the sale of the fixtures unless it has a lease stamp, notwithstanding it is stamped as an agreement, the one contract being auxiliary to the other.[34] Any further consideration of the subject of Stamp Acts would be foreign to the purpose of this treatise, and, for further information on the subject, the reader is referred to the authorities cited in the notes.[35]

*VIII. Estoppel. [*346]

The doctrine of estoppel applies to sales of fixtures. Thus, a landlord who stands by and sees a former tenant sell as his own to an incoming tenant, articles which are fixtures, without

[32] See, Hallen v. Runder, 3 Tyrwh., 959 (1834); s. c., 1 Cr. M. & R., 266; Lee v. Gaskell, 45 L. J. (Q. B. D.), 540 (1876); Ferard Fixt., 255. See, also, the cases cited in next section. [But see McKenzie v. McDonald, 2 Nova S., Dec., 11, 12 (1869).]

[33] See, generally, Wick v. Hodgson, 12 Moore, 213 (1827); Marson v. Short, 2 Scott, 243 (1835); s. c., 2 Bing., N. C., 118, per Park, J.; Chanter v. Dickenson, 5 M. & G., 253 (1843); s. c., 6 Scott, N. R., 182; Horsfall v. Key (or Hey), 2 Exch., 778 (1848); s. c., 17 L. J., Exch., 266. See, also, Pinner v. Arnold, 2 Cr. M. & R., 613 (1835); s. c., Tyrwh. & Gr., 1.

[34] Corder v. Drakeford, 3 Taunt., 382 (1811). See, also, Clayton v. Burtenshaw, 5 B. & C., 41 (1826); 1 Camp. N. P., 387; 3 Stark., 128.

[35] Duck v. Braddyl, 1 M'Clel., 217 (1824); s. c., 13 Price, 455; Coster v. Cowling, 7 Bing., 456 (1831); Wilks v. Atkinson, 6 Taunt., 11 (1815); Hughes v. Breeds, 2 C. & P., 159 (1825); Garbutt v. Watson, 5 B. & Ald., 613 (1822); Buxton v. Bedell, 3 East, 303 (1803); Ferard Fixt., 255, 357.

asserting his own title or giving such incoming tenant any notice of his claim, is estopped as against such purchaser from asserting it afterwards;[36] and the converse is equally true. But declarations or admissions of want of title to fixtures made by

[36] Villas v. Mason, 25 Wis., 310 (1870). See, also, Gregg v. Wells, 2 Per. & D., 296 (1839); s. c., 10 Ad. & E., 90; *Ex parte* Ames, 1 Lowell's Dec., 567 (1871); Pecoul v. Auge. 18 La. Ann., 615 (1866). [Exchange Bldg. Co. v. Schuchman Realty Co., 103 Mo. App., 24 (1903); Whitney v. Shippen, 89 Pa. St., 22, 26 (1879); Gray v. McLennan, 3 Man., 337, 345 (1886); see, also, Bramble v. Kingsbury, 39 Ark., 131, 134 (1882); Hibernia Nat. Bank v. Sarah Planting Co., 107 La., 650, 656 (1902); Morrison v. Sohn, 90 Mo. App., 76, 81 (1901).]

[Where a landlord permits a chattel mortgagee to remove certain fixtures, and buys some himself, but refuses to allow the removal of others on the ground that such removal would injure the building, he can not, after the mortgagee has brought an action of replevin for such fixtures, claim them as having been forfeited by the tenant's having taken a new lease without reserving them. Bernheimer v. Adams, 70 App. Div., 114, 120 (1902), affirmed 175 N. Y., 472 (1903).]

[Where a landowner leases, from a former lessee, machinery left by the latter upon the premises, and, when the lease expires, requests the former lessee not to remove it, he is estopped from saying that the former lessee did not own it. Carper v. Risdon, 76 Pac., 744, 746 (Colo. App., 1904).]

[Where a former lessee urges another to take a lease of the premises which contains a clause: "Also the shaft already dug upon said premises with the coal cars and everything else situated upon the following described premises," he is estopped to assert a claim for his improvements against the incoming lessee. Stewart v. Munford, 91 Ill., 58 (1878).]

[In Friedlander v. Ryder, 30 Neb., 783, 789 (1890), in which it was held that a frame addition erected by a tenant was not removable, the court referred to the fact that the landlord had allowed a deduction from the rent for repairs afterwards made upon the structure, but no comment was made by the court as to the effect of such action.]

[Where a wife claiming a house standing upon the land of another as her personal property, allows her husband to hold himself out as the owner, and the land-owner, in ignorance of the wife's claim, buys from the husband, she will be estopped to recover the value of the house from the land-owner. Griffen v. Ransdell, 71 Ind., 440, 445 (1880).]

[Where a partition is levied upon as the property of the tenant, the landlord is not estopped to claim it either because he bid therefor at the execution-sale, nor because of his failure to notify the sheriff nor the purchaser that it was not removable. The character of the property was open to observation, and the landlord was under no legal duty to expound his opinion. McAuliffe v. Mann, 37 Mich., 539, 542 (1877).]

[Where, at a foreclosure sale of a house and lot, no announcement was made that gas-fixtures and mirrors were to be included, the failure of the owner, being present, to give any notice of his claim to the chattels does not estop him from asserting title. McKeage v. Hanover Ins. Co., 81 N. Y., 38, 43 (1880).]

[Where a person is made defendant to a foreclosure action and makes no defense, and is present at the foreclosure sale, and makes no claim to the property sold thereunder, he is estopped from claiming that fixtures were not a part of the realty. Trowbridge v. Hayes, 45 N. Y. Supp., 635, 637 (1896).]

[Where the owner of land, upon which there is a steam-engine and boiler, sells them, in fraud of creditors, as personal property, and, after they have been levied upon as the property of the seller, the buyer removes and claims them, the buyer is estopped from averring that they were a part of the realty at the time the levy was made. Earley v. Withers, 1 Pearson, 248, 250 (Pa., 1864).]

[Where, after a sheriff has levied upon an engine and boiler annexed to the freehold, the landowner sells them as chattels, the buyer who removes them is disabled from contending that they were not chattels at the time of the levy. Walton v. Jarvis, 14 Up. Can., Q. B., 640.]

[Where machinery, after a fire, is moved to another place without objection from the mortgagee of the land upon which it stood, and is mortgaged as personal property, the mortgagee of the land, in foreclosing his mortgage nearly two years later, can not follow such machinery and make it liable under his real estate mortgage. Padgett v. Cleveland, 33 S. C., 339, 349 (1889).]

[Where a tramroad is located upon more than one tract of land, one of which is owned in common, a levy upon the tramroad by one tenant in common does not estop him from claiming that the tramroad is a part of the realty, when there is nothing to show that such levy was not made upon that part of the tramroad located upon other tracts, and notice was given by some of the co-tenants at the sale that the tramroad upon their land was realty. Silliman v. Whitmer, 11 Pa. Super., 243, 265 (1899), affirmed 196 Pa. St., 363, 365 (1900).]

[A mortgagee knew of the sale of a barn upon the mortgaged premises by the mortgagor, but did not assent thereto. Then the mortgagor conveyed the premises, reserving the barn. Later the mortgage was assigned to the grantee, who knew of the sale of the barn. *Held*, that the grantee was not estopped from asserting title to the barn through the assignment of the mortgage, as the mortgagee's title thereto was never impaired, and was superior to all others. Linscott v. Weeks, 72 Me., 506 (1881).]

[Where, at a meeting of the creditors of an insolvent firm, the landlord of the partners being present, the landlord is given security for his claim, and another creditor is secured by a chattel mortgage upon an engine, boiler and attachments, the landlord, after receiving the full benefit of his security, can not assert that the engine, boiler and attachments are a part

one without consideration, in ignorance of and without the intention of relinquishing his rights, work no estoppel.[37] A person and those claiming under him may also be estopped

of the realty. Conde v. Lee, 55 App. Div., 401, 404 (1900), affirmed 171 N. Y., 662 (1902).]

[Where the owner of machinery, which is claimed by land-owners as a fixture, agrees to return the property after using it elsewhere, he is not estopped to assert title to it, as the agreement is no more than a promise to put it back, and he does not thereby recognize the title of the land-owners. Bewick v. Fletcher, 41 Mich., 625, 626 (1879).]

[That a mortgagee of the land told the owner that foreclosure would be waived upon certain conditions, does not estop him from claiming the crops of a tenant, the conditions never having been accepted nor performed. Reed v. Swan, 133 Mo., 100, 110 (1895).]

[A statement by the plaintiff to the defendant, while an action for ejectment was pending, that the latter could "go ahead with that crop and put it in the same as you have been doing," does not estop the plaintiff, upon being placed in possession of the land, from claiming a crop growing thereon. Davis v. Callahan, 66 Mo. App., 168, 171 (1896).]

[Where a barn has been insured by one who represented it as being part of his freehold, he can not, after failing to prove title to the land, be heard to claim that he insured the barn as a chattel. Sherboneau v. Beaver Ins. Co., 33 Up. Can., Q. B., 1 (1872), affirming 30 Up. Can., Q. B., 472 (1870).]

[37] Harlan v. Harlan, 15 Penn. St., 507 (1850); s. c., 20 Id., 303. See further on the subject of estoppel, Meigs's Appeal, 62 Penn. St., 28 (1869). [Long v. Anderson, 62 Ind., 537 (1878); Smith v. Sprague, 119 Mich., 148, 150 (1899); Kirchman v. Lapp, 19 N. Y. Supp., 831, 832 (1892); Hamilton v. Austin, 43 Supr. Ct. (36 Hun), 138, 144 (N. Y., 1885); see, also, Sun Assurance Co. v. Taylor, 9 Man., 89, 100 (1893).]

[Where an attorney of a landowner misstated to one negotiating for his tenant's interests, that the landowner had no claim to buildings erected by the tenant, but corrected the statement before it was acted upon, no ground for estoppel arises. Sanitary District of Chicago v. Cook, 169 Ill., 184, 195 (1897).]

[Failure of a tenant to object to a sale of fixtures in his possession, but belonging to his landlord, does not affect the landlord's rights. Grimshawe v. Burnham, 25 Up. Can., Q. B., 147 (1865).]

[A statement by a tenant that he owned the house, and that the landlord knew that he was the owner and acquiesced in his statement, does not prevent the landlord from denying that he was such owner. Talbot v. Cruger, 88 Supr. Ct. (81 Hun), 504 (1894), affirmed 151 N. Y., 117, 121 (1896).]

[A beneficiary in a deed of trust can not be estopped by assurances made by the trustee that the beneficiary would make no claim to articles

from denying that a building or other fixture is a chattel by describing it as "goods and chattels" in a chattel mortgage given by him thereon.[38]

as fixtures; and especially is this the case where the trustee merely offers this as his opinion. Fisk v. People's Bank, 14 Colo. App., 21, 31 (1899).]

[Where a conditional seller of machinery takes a second mortgage upon the land to which the machinery is attached, and for security for the price thereof, such second mortgage reciting that such machinery is a part of the freehold, the second mortgagee is not estopped from claiming the machinery as chattels when the recital in the second mortgage was inserted by mistake resulting from an unintentional misrepresentation of the mortgagor. Waterous Engine Co. v. Henry, 2 Man., 169 (1884).]

[38] Ballou v. Jones, 37 Ill., 95 (1865). [Gordon v. Miller, 28 Ind. App., 612, 619 (1901); Corcoran v. Webster, 50 Wis., 125, 130 (1880). Or, conversely, by taking a chattel mortgage. Lansing Works v. Wilbur, 111 Mich., 413, 420 (1897); Platto v. Gettleman, 85 Wis., 105, 109 (1893); Smith v. Waggoner, 50 Wis., 155, 161 (1880); see, also, Stevens Mfg. Co. v. Barfoot, 9 Ont., 692, 696 (1885). But see Fifield v. Farmers Nat. Bank, 148 Ill., 163, 173 (1893); Stevens v. Barfoot, 13 Up. Can. App., 366 (1886); Sun Assurance Co. v. Taylor, 9 Man., 89, 98 (1893), where a mortgagee of the realty takes a chattel mortgage of machinery thereon as a precaution.]

[In order that a mortgagor may be estopped by his chattel mortgage it must appear that he had the intention, at the time he made the improvement, that it should not become a part of the realty. Where a lessee of a strip of land erects a steam elevator thereon, which the lease does not give him authority to remove, and which is actually real estate, and which can not be removed without injury to itself and to the realty, a subsequent mortgage thereof in which it is referred to as "goods and chattels" will not estop the mortgagor from claiming that the elevator is realty as against his judgment creditors, who also claim that it is realty. Cross v. Weare Commission Co., 153 Ill., 499, 512 (1894).]

[A person is not estopped to deny that a building is personalty by accepting a deed describing it as a chattel, and having it acknowledged and entered as a chattel mortgage, where the party claiming an estoppel had the same means of knowledge as to which class of property the building belonged, and has not changed his conduct in consequence of the acts of the other. Knapp v. Jones, 143 Ill., 375 (1892).]

[The parties benefited by a deed of trust of realty which designates a steam-engine and boilers thereon as personalty, are not estopped from claiming that the engine and boiler are realty, as no one can be misled. Jenney v. Jackson, 6 Ill. App., 32, 36 (1880).]

[The fact that a purchaser at an execution sale of land, holds a second mortgage upon machinery thereon as chattels, does not estop him from claiming such machinery as fixtures as against the party holding the first chattel mortgage thereon. Keve v. Paxton, 26 N. J. Eq., 107, 109 (1875).]

[A person, by taking a bill of sale of a house, is estopped from asserting it to be realty. Apolo v. Kauo, 7 Hawaii, 755, 757 (1889).]

[Where a builder of a house upon land for which he has a contract of purchase, rents it, he necessarily rents it to stand where it is, and he can not, at the same time, treat it as personalty. Braeclin v. McLaren, 59 Mich., 327, 328 (1886).]

[One who has placed mill-stones in a mill under an agreement that they are to remain his separate property, is not estopped to claim them by the mere fact that he afterwards leases the mill, where the mill-stones are not mentioned in the agreement. Sullivan v. Jones, 14 S. C., 362, 365 (1880).]

[Where a tenant took the acknowledgment of his wife to a mortgage of the land, there being nothing in the mortgage to indicate that it covered a portable sawmill thereon, and the mortgagee knowing that the husband claimed it, he is not estopped to assert his title to the mill as a chattel. Bartlett v. Haviland, 92 Mich., 552, 556 (1892).]

[Where a subsequent incumbrancer, in compelling a prior mortgagee to account, treats all the trade fixtures as part of the realty, he can not afterwards levy upon these fixtures as chattels. Carson v. Simpson, 25 Ont., 385 (1894).]

[Where the owner of buildings, who has no interest in the land upon which they are located, sells them, and afterwards obtains title to the land before the buildings are removed, the rights of the purchaser of the buildings are not prejudiced; for if the former landowner had no legal interest in the buildings, the conveyance did not affect them, and if he had an interest in the buildings, the conveyance ought, in equity and good conscience to operate in effectuation of the former sale. Myrick v. Bill, 3 Dak., 284, 290 (1883).]

[Where a partition suit is brought by the purchaser of a mill under a decree adjudging it to be realty, the defendants can not allege it to be personal property, as the decree, to which they were parties, is conclusive until reversed, and can not be attacked collaterally. Marshall v. Stewart, 80 Ind., 189 (1881).]

[Where a mortgagee, in foreclosing his mortgage, calls it a real-estate mortgage, and refers in his bill to the building on the land as a part thereof and as being covered by a prior real estate mortgage, he is estopped, as against a purchaser at the sale, from asserting the building to be personal property. Miles v. McNaughton, 111 Mich., 350, 355 (1896).]

[Where in ejectment for land, the defendant claimed no exclusive property in a house thereon, and a verdict was rendered for a moiety of the land, the defendant is estopped, in a subsequent partition suit, from claiming such improvement as being his exclusively. Booth v. Kapuakela, 10 Hawaii, 414, 415 (1896).]

[A mortgagee of land instituting replevin suit for an engine and sawmill, can not afterwards claim that they are covered by his mortgage as realty. Long v. Cockern, 128 Ill., 29, 36 (1889), affirming 29 Ill. App., 304, 312 (1888). When a party brings an action of replevin for rails in a

IX. Agreements as to Valuation of Fixtures and Improvements.

Upon the demise of a house or other premises, the lease is often made in one form or another to contain a covenant on the part of the landlord at the end of the term to pay for fixtures or improvements put upon the premises by the tenant at a valuation, or to grant a renewal of the lease or allow the tenant to remove the same; and especially is this the case with reference to buildings or other permanent and substantial improvements which by the general rules of law would not be *allowed to be removed by the tenant at the termination [*347] of his term, but in the absence of a contract regulating the rights of the parties would go to the landlord as a part of the estate without his making any compensation therefor.[1] But in

fence, he is estopped, when sued upon the replevin bond, from insisting that the justice had no jurisdiction. Fahnestock v. Gilham, 77 Ill., 637, 639 (1875).]

[A party, who proves his title to property on the ground that it was realty, can not treat it as personalty for the purpose of entering judgment upon a claim bond. Bull v. Jones, 9 Tex. Civ. App., 346, 349 (1895).]

[That a mortgagee has called articles personal property in his affidavit for a writ of replevin, should not estop him, when sued on his bond, from showing that they are fixtures. Howell v. Barnard, 32 Ill. App., 120, 121 (1889).]

[1] Kutter v. Smith, 2 Wall., 491 (1864). [See, *ante*, p. *133. Goeio v. Day, 51 Ark., 46, 48 (1888); Chilvers v. Race, 196 Ill., 71, 82 (1902); Douglass v. Anderson, 28 Kan., 262, 264 (1882); Guthrie v. Guthrie, 78 S. W., 474 (Ky., 1904); Gudgell v. Duvall, 27 Ky., 229, 230 (1830); Sparks v. Ball, 13 Ky. Law R., 63 (1891); Tyler v. Jacob, 4 Ky. L. R., 717 (1883); Leslie v. Smith, 32 Mich., 64, 68 (1875); Sims v. Kelsay, 75 Mo., 68, 71 (1881); McAllister v. Reel, 59 Mo. App., 70, 74 (1894); Swift v. Sheehy, 88 Fed., 924, 927 (U. S. C. C., Mo., 1898); Murphey v. Illinois Tr. & Sav. Bank, 57 Neb., 519, 522 (1899); Hart v. Hart, 117 Wis., 639, 657 (1903).] A tenant for life cannot lay out moneys in improvements on the estate, though lasting and substantial, and charge them on the inheritance. Caldecott v. Brown, 2 Hare, 144 (1842); Nairn v. Majoribanks, 3 Russ., 582 (1827). [Pickett v. Pope, 74 Ala., 122, 132 (1883); Austell v. Swann, 74 Ga., 278, 282 (1884); Hagan v. Varney, 147 Ill., 281, 292 (1893); Henry v. Brown, 99 Ky., 13, 15 (1896); Nineteenth Pres. Ch. v. Fithian, 16 Ky. L. R., 581, 582 (1895); Sparks v. Ball, 91 Ky., 502 (1891); Porter v. Osmun, 98 N. W., 859, 860 (Mich., 1904); Weber v. Lanman, 91 Md., 90, 99 (1900); Pratt v. Douglas, 38 N. J. Eq., 516,

order to entitle the lessee to the benefit of any such covenant in his favor, the erections and improvements made by him must be of the character authorized in the lease to be erected by him and for which the lessor has promised to pay; and, if they do not correspond with the erections authorized by the lease, both as to the place and character of the erections, the lessor is not liable to pay therefor.[2] So, where the lessor covenanted on the

542 (1884); *Re* Lamb, 65 N. Y. St. R., 460 (1894); VanBibber v. Williamson, 37 Fed., 756, 759 (U. S. C. C., Ohio, 1889); Moore v. Simonson, 27 Ore., 117, 126 (1895); Trimmier v. Darden, 61 S. C., 220, 235 (1901); Corbett v. Laurens, 5 Rich., 301 (S. C. Eq., 1853); Brooks v. Brooks, 12 S. C., 422, 464 (1879); Casto v. Kintzel, 27 W. Va., 750, 756 (1886); see, also, Dean v. Feely, 69 Ga., 804, 817 (1883); Effinger v. Hall, 81 Va., 94, 109 (1885).]

[Improvements made by a tenant *pur autre vie* go the heirs of *cestui qui vie*. Brugers v. Slidell, 27 La. Ann., 70 (1875).]

[Where a tenant for life is appointed by court as agent for the devisees in remainder to rebuild a hotel destroyed by fire, he can not bind them personally for expenses incurred. Rudd v. Littell, 20 Ky. L. R., 158 (1898).]

[A tenant under the owner of a life estate, who is also tenant in common in the remainder, can not recover for improvements made during the life estate against the wishes of his co-tenants. Ashby v. Ashby, 59 N. J. Eq., 547, 560 (1900).]

[A tenant for life can not charge the inheritance with the expense of a new heating apparatus, consisting of a boiler and pipes, although there was no proper method of heating the house, and it was essential, in order to bring the conveniences to the modern standard of comfort. *Re* Gaskell's Set. Est. (1894), 8 Repts., 67.]

[Where a building has been destroyed by the act of God, the tenant for life has no right to take timber from the estate, to its injury, to rebuild. Miller v. Shields, 55 Ind., 71, 77 (1876).]

[Where the life tenant is an infant, and his guardian, by authority of court, expends his funds in improvements, the life tenant is entitled to relief if the parties can be placed *in statu quo*, and the remainderman realize his original estate with the natural increase. Caldwell v. Jacob, 16 Ky. L. R., 21, 24 (1894).]

[2] Ostrander v. Livingston, 3 Barb. Ch., 416 (1848); Fisher v. Fisher, 1 Bradf. Sur., 335 (1850); Pike v. Butler, 4 N. Y., 360 (1850); reversing s. c., 4 Barb., 650; Berry v. Van Winkle, 2 N. J. Eq., 390 (1841), s. c., Id., 269. In this case the landlord agreed that the lessee might erect a "carding and fulling mill or any other machinery," and that at the expiration of the lease all improvements made upon the lot should be the property of the lessor, he paying for the same, at a valuation. The tenant erected buildings, put machinery into them, and among the rest built a

saw-mill and its appendages, the mill being originally only a cover to the water-wheel, in which machinery was afterwards placed for sawing lumber. *Held,* that the agreement to pay for improvements referred only to such as he had previously authorized to be made; that the words "all improvements," which the landlord agreed to pay for, referred to all such only as by the previous part of the lease it had been agreed might be placed upon the lot; that the machinery contemplated could have been nothing beyond such as was permanent and essential to the building as a carding or fulling-mill, with liberty to change it if necessary or desirable to change the course of business; and that nothing but the buildings and their permanent fixtures (excluding everything movable) should be valued. See, also, Woodward v. Payne, 16 Cal., 444 (1860); also, Hasty v. Wheeler, 12 Me., 434 (1835), where the meaning of the word "improvements" is considered. [Mullen v. Pugh, 16 Ind. App., 337, 340 (1896); McIntosh v. St. Philip's Church, 120 N. Y., 7, 12 (1890), aff'g 54 N. Y. Super., 291 (1887); Brown v. Galagher, 5 Ohio Dec., 556, 557 (1897).]

[Where, by the terms of a lease, the tenant is to "take down and remove * * * * and erect upon said land in place thereof" a building, which is to be valued, he can not claim payment for alteration or improvements in the original structure. Smith v. Cooley, 5 Daly, 401, 410 (N. Y. C. P., 1874).]

[A lease of vacant land for forty years contained a covenant that the lessee was to yield up the premises "with all erections, buildings and improvements" subject to a covenant that the lessor was to purchase "all and every the said buildings, erections, and fixtures." The lease was silent as to the purpose for which the buildings were to be erected. *Held,* that as to what articles the lessor was required to pay depended upon the intention of the parties. Where the words "erections," "buildings," "improvements," and "fixtures" are intended as convertible terms, and belong to the same category, "fixtures" relates back to such as belong to the soil; and the lessor could not be required to pay for trade-fixtures. It is no argument against a construction of a covenant that such construction does not change common law rights. Byrnes v. Macarthur, 2 N. S. W. L. R., 57 (1881).]

[Under a covenant to pay for "erections and buildings" the lessor is not liable for crib-work and earth-filling done to convert a lot covered with water into dry land level with adjoining land. Adamson v. Rogers, 26 Can., 159 (1896), affirming 22 Ont. App., 415 (1895). A lessor was to pay for all "permanent improvements, such as cistern, privy, cellar and fencing." *Held,* not to include grading of lot, shrubbery nor fruit trees planted for lessee's own comfort. Deishler v. Golbaugh, 2 Ky. L. R., 231 (1881).]

[An undertaking to render a fair consideration for a barn can not be construed to include the cost of a pump. Smyth v. Stoddard, 203 Ill., 424, 431, (1903).]

[Where the lease provided that the lessee should keep the premises in good repair and under good fence, and there was also a provision that

expiration or sooner determination of the term to re-purchase of the lessee certain fixtures on the premises at a valuation by appraisers, one to be appointed by each party, the agreement on this point being mutual, and subsequently by the bankruptcy of the tenant and his assignee's declining the lease (which was [*348] delivered up according to 6 Geo. IV., c. 16, s. 75), *the

the lessor should pay for improvements made by the lessee, the lessee can recover for fences around land not enclosed at the time the lease was executed, but not for repairs upon fences existing at that time. Hazlewood v. Pennybacker, 50 S. W., 199, 202 (Tex. Civ. App., 1899).]

[Under an agreement by the lessor to pay for "buildings and erections," he should pay for fixtures and mill machinery which are a part of the realty, although, under the statute, the lessee would have a right to remove them. *Re* Brantford Power Co., 28 Ont., 40, 44 (1896), affirmed 24 Ont. App., 301 (1897).]

[Where a lease was made for the purpose of building a dock and shipyard, and contained a provision for payment, by the lessor, for "buildings and fixtures" erected by the lessees, *held*, that the provision covered the dock, water-wheels, shafting, machinery, a floating-bridge and a wire sign-board. Grier v. Queen, 4 Exch., 168 (Can., 1894).]

[Erections or additions to the premises calculated to enhance their value and render them desirable as residence property are improvements within the covenants of the lease. Hopkins v. Gilman, 47 Wis., 581 (1879).]

[Where the south wall of the building did not stand upon the lessor's land, but he had full opportunity for knowledge of the facts, he will not be permitted to repudiate the valuation when he finds that it is not acceptable to him. Yeatman v. Clevens, 6 Mo. App., 210 (1878).]

[Where the covenant was that the lessees in making additions and improvements, should "preserve unimpaired, the entrance and right of way," etc., and their complaint averred that the improvements made were "in pursuance of the liberty and privilege granted to them," the defendant demurred for that the complaint did not show the performance of the condition precedent that the alley entrance was undisturbed. The court held that, if the proviso was a condition precedent, if the buildings were erected by the lessees "in pursuance of the liberty" given in the covenant, none of the directions could have been disregarded, and the avenue into the rear must have been left open, and the defendant is required to deny the allegation. "The inclination of the courts is to relax the stringent rules of the common law which allows no recovery upon a special unperformed contract itself, nor for the value of the work done because the special excludes an implied contract. In such case if the party has derived any benefit from the labor done, it would be unjust to allow him to retain that without paying anything." The law implies a promise to pay such remuneration as the benefit conferred is really worth. Gorman v. Bellamy, 82 N. C., 496 (1880).]

bankrupt was discharged from obligation under this covenant, it was held that performance of the covenant could not be enforced by the assignee against the lessor.[1]

Where a lease contains a covenant that at the expiration of the term the lessors, their successors or assigns, shall purchase at an appraisal the improvements made by the lessee, which at the expiration of the term the lessor refuses to do, the covenant is broken. Of this covenant, however, there can be but one breach, upon which the whole damage becomes recoverable, so that the covenant becomes extinguished; and the breach not being a continuous one, one who after such breach becomes the assignee of the lessor with knowledge of it, does not take the land chargeable with the covenant.[2]

While it is a general rule that the heir cannot be prejudiced by the admission or act of the administrators or executors, it is held that a covenant in a lease to pay for improvements a valuation to be appraised at the end of the term by appraisers to be appointed by the parties, their heirs, executors, administrators or assigns, authorizes the administrators to appoint in the absence of any other nomination by other parties in interest; and the appraisement made by the person so appointed will bind the heir.[3]

[1] Kearsey v. Carstairs, 2 B. & Ad., 716 (1831).

[2] Coffin v. Talman, 8 N. Y., 465 (1854). [Gardner v. Samuels, 116 Cal., 84, 88 (1897).]

[One to whom the land is conveyed after the expiration of the lease, while not personally bound for improvements as an assignee of the lease would be, yet he has notice, by the tenant's possession, of the latter's equitable lien, and can not recover possession until the lien is discharged. Ecke v. Fetzer, 65 Wis., 55 (1886).]

[The agreement does not bind the assignee of the lessors if the subject-matter is personal property; and not in any case unless the covenantor has expressly bound his assigns. Etowah Min. Co. v. Wills Mfg. Co., 121 Ala., 672, 676 (1898).]

[An assignee of a lease made a sub-lease agreeing to take, at a valuation, buildings to be placed thereon by the sub-lessee. Later, the original lessor took an assignment of the reversionary interest of his lessee and of the rights of the assignee, and claimed the benefits of the underlease. *Held*, that the assignment to the original lessor was not a surrender nor a merger, and that he should pay for the improvements. Bailey v. Richardson, 66 Cal., 416 (1885).]

[3] Renwick v. Renwick, 1 Bradf., 234 (1850).

Where a lease contains a covenant that at the expiration of the term the buildings and improvements shall be valued by indifferent persons to be chosen by the lessor and lessee, and that the appraised value shall be paid to the lessee, an *ex parte* appraisement by appraisers appointed solely by one of the parties upon the refusal of the other to appoint, will not, in the absence of a provision in the lease authorizing such *ex parte* proceeding, be binding upon the party not joining in the nomination of the appraisers; and in an action upon the covenant the value of the improvements will be considered as unliquidated.[4] And a court of chancery cannot compel the [*349] *party refusing to appoint an appraiser, to make such choice.[5] Neither will a court of chancery grant specific performance of a contract to purchase tenant's fixtures, furniture, etc., at a valuation to be made, it being impossible for the court to decree specific performance of a sale or purchase at a valuation, unless already made, on account of the impossibility of working out such a decree.[6] But upon a bill for the specific per-

[4] See Holliday v. Marshall, 7 John., 211 (1810); Copper v. Wells, 1 N. J. Eq., 10 (1830). See, however, Conner v. Jones, 28 Cal., 59 (1865).

[Where the lessor ignores the nominee of the lessee, and appoints a sole arbitrator, proceedings by the latter will be restrained. Farley v. Sanson, 5 Ont. Law R., 105, 112 (1902), affirmed in 40 Can. Law J., 506 (Ont. App., 1904).]

[Where the appraisers are to construe the contract as well as to determine the value of the building, an appraisal made without opportunity for the parties to be heard, is invalid. Janney v. Goehringer, 52 Minn., 428 (1893).]

[Where the lessor covenants to pay the valuation of buildings upon the demised premises, such valuation to be made by "disinterested persons," but no provision is made for the manner in which the appraisers are to be appointed, if the appraisers are appointed by the lessor, he has performed his covenant, there being no evidence that the appraisers were incompetent or interested. Gilbert v. Smith, 18 N. Brunsw., 211 (1878).]

[Where the proviso gives the lessor an option to purchase any building erected on the demised lands "at a price to be fixed by the said lessee," the lessee can effectually prevent the lessor from retaining the building by simply placing the price as far beyond its value as he thinks proper. Gray v. McLennan, 3 Man., 337, 348 (1886).]

[5] Copper v. Wells (*supra*). See, also, Darby v. Whitaker (*infra*). [Hug v. Van Burkleo, 58 Mo., 202, 203 (1874).]

[6] Darby v. Whitaker, 5 W. R., 772 (1857). See, also, Copper v. Wells (*supra*).

formance of an agreement, at the expiration of the term to take buildings and improvements at a valuation to be made by indifferent persons to be chosen by lessor and lessee, where a specific performance has become impossible, as where the defendant has placed it out of his power to fulfil his part of the contract, or where from the nature of the contract it cannot be decreed, and the complainant can have no adequate relief except in equity, though the alternative prayer of the bill be purely for compensation, the court will relieve and grant compensation in damages for permanent and valuable improvements put by the lessee upon the demised premises under such agreement.[7] So, where in such a case the lessor and lessee severally nominated an appraiser who could neither agree as to the valuation nor upon an umpire, and thereupon two more were appointed with like result, whereupon the lessor selected a third and the lessee insisted upon the one he had nominated secondly and declined to nominate another, and the parties themselves could not agree as to the value, the *lessor was held entitled [*350] in equity to have the extent of his liability ascertained and extinguished upon payment of such sum as should be ascertained to be the just value of the buildings.[8]

But it is *held* that where the person named by both parties to make the valuation is refused by the vendor permission to enter the premises for that purpose, the court will make a mandatory order to compel the vendor to allow the entry to enable the valuation to proceed. Smith v. Peters, L. R., 20 Eq., 511 (1875).

[7] Copper v. Wells (*supra*); Berry v. Van Winkle, 2 N. J. Eq., 269 (1839); s. c., Id., 390. But jurisdiction will not be extended beyond the claim of the lessee for permanent and valuable improvements put on the premises by the lessee and which pass to the lessor at the end of the term, so as to include a claim for alleged infringements on the rights of the lessee during the whole term, as to which he must seek a remedy at law. Berry v. Van Winkle (*supra*). [See White Stone Quarry Co. v. Belknap Stone Co., 13 Ky. L. R., 244, 247 (1891); Hug v. Van Burkleo, 58 Mo., 202, 203 (1874); Biddle v. McDonough, 15 Mo. App., 532 (1884); Hopkins v. Gilman, 22 Wis., 476 (1868).]

[8] Reformed Protestant Dutch Church of New York v. Parkhurst, 4 Bosw., 491 (1859). [Cooke v. Miller, 54 Atl., 927 (R. I., 1903); see, also, Conger v. Ensler, 85 App. Div., 564 (N. Y., 1903).]

[If the arbitration fails through no substantial fault of the tenant, the court will fix the value. Bales v. Gilbert, 84 Mo. App., 675, 679 (1900).]

Where it is provided in the lease that improvements, consisting of buildings, machinery, etc., to be erected by the lessee at his own expense, shall at the expiration of the term belong to the lessor, he paying therefor at a valuation, such improvements are to be valued as they are at the expiration of the term.[9]

[See Biddle v. Ramsey, 52 Mo., 153, 158 (1873), as to fraud in preventing a valuation.]

[9] Berry v. Van Winkle, 2 N. J. Eq., 269, 277 (1839); s. c., Id., 390. [Tuttle v. Leiter, 82 Fed., 947, 950 (U. S. C. C., Ill., 1897); Edwards v. Van Patten, 46 Kan., 509 (1891); see, also, Jones v. Hoard, 59 Ark., 42, 47 (1894); Finkelmeier v. Bates, 92 N. Y., 172, 179 (1883).]

[Where a lease provides for the recovery, by the lessee, of the value of a building "at the expiration of said term," it refers to the time provided by the lease for the term to expire in the event that there was any default; and if the lessor forfeits the lease on account of the default of the lessee, the latter can not take advantage of his own act, but must wait until the expiration of the full period named in the lease. Lent v. Curtis, 14 Ohio Circ., Dec., 592, 604 (1902).]

[Where a son was, in return for taking care of his parents for life, to have the use of a farm, and to be paid for improvements out of the effects of said parents after their decease, the value of such improvements is to be determined by their reasonable cost at the time they were made, and not by their value at the time of the expiration of the tenancy; otherwise, by lapse of time, the improvements might become valueless, and defeat the provision. Wisehart v. Grose, 71 Ind., 260 (1880).]

[Under eminent domain proceedings instituted before the completion of the term, it is proper to award to the tenant the value of his buildings. Livingston v. Sulzer, 26 Supr. Ct. (19 Hun), 375, 382 (N. Y., 1879).]

[Where a contract provides that if the lessor should reimburse the lessee for payments made upon the purchase price of the land, and also pay for the value of improvements placed upon the land by the lessee, the property is to be restored to the lessor, otherwise to belong to the lessee, the lessor can maintain an equitable action before the expiration of the lease to determine the value of the improvements so that he can redeem. Todd v. Kirby, 4 Ky. L. R., 887 (1883).]

[Where improvements are to be appraised "without regard to the situation or value of the premises leased," whatever was built or placed thereon which was a substantial benefit to the premises, or rendered them more fit for use as residence property, or more capable of producing an income, should be paid for at its present cost or actual value, and not what the improvements are worth to the tenant irrespective of their connection with the land. Hopkins v. Gilman, 47 Wis., 581 (1879).]

[Where a lease provided that the lessor should pay the "value" of an improvement, and later stipulated that the lessor was not to pay for any-

Where the lease provides that the appraisement shall be made a specified number of days before the expiration of the term, though it is not done within that time, yet where there has been a fair effort on the part of the lessee to have the improvements appraised, and they have been in fact appraised before the expiration of the term and their value has also been ascertained and proved to the court, and the heirs of the lessor have received the benefit of such improvements in the enhanced value of the property, the specified time will not in equity be considered as of the essence of the contract, and the lessee has in equity a lien upon the premises for the value of such improvements.[10] But where the lease provides for the payment to the lessee at the end of the term of the appraised value of buildings to be erected on the demised premises, and before that time the lessor re-enters to enforce a forfeiture for non-payment of rent in accordance with the terms of the lease, the lessee cannot maintain a bill for the value of his improvements. If he has any remedy in such a case he must wait until the time fixed by the contract has expired; and he cannot, by his own default, change in his own favor the terms of the contract, and fix upon the lessor a contract he never made.[11]

*For a further consideration of the subject of covenants [*351] to pay for improvements at a valuation or to grant a renewal of the lease, etc., and other similar covenants, reference is made to the authorities cited in the note below.[12]

thing except the actual "cost" of the improvement, and then provided for appraisers in case of disagreement, *held*, that the lessor could only be compelled to pay the value, not exceeding the cost, as it is reasonable to suppose that the appraisers were to pass upon the value and not arbitrate as to the cost. Hart Lumber Co. v. Everett Land Co., 20 Wash., 71, 73 (1898).]

[10] Renwick v. Renwick, 1 Bradf., 234 (1850).

[11] Lawrence v. Knight, 11 Cal., 298 (1858). [Johnston v. Bates, 48 N. Y. Super., 180 (1882).]

In like manner a provision for a valuation three months previous to the determination of the term, refers to its expiration by efluxion of time; and in case of forfeiture, no valuation need be made. Storer v. Hunter, 3 B. & C., 368 (1824). See, also, Fairburn v. Eastwood, 6 M. & W., 679 (1840). [Wilcoxen v. Hybarger, 1 Ind. Ter., 138, 144 (1897); Switzer v. Allen, 11 Mont., 160 (1891).]

[12] As to tenant's right to the possession of the premises till paid the value of his improvements, see Van Rensselaer v. Penniman, 6 Wend., 569

(1831); Holsman v. Abrams, 2 Duer, 435 (1853); Tallman v. Coffin, 4 N. Y., 134 (1850); Pearce v. Colden, 8 Barb., 522 (1850). [Mullen v. Pugh, 16 Ind. App., 337, 340 (1896); Bresler v. Darmstaetter, 57 Mich., 311 (1885); VanBeuren v. Wotherspoon, 164 N. Y., 368, 379 (1900); 74 App. Div., 123 (1902); Conger v. Ensler, 85 App. Div., 564 (N. Y., 1903); Paine v. Rector, 14 Supr. Ct. (7 Hun), 89 (N. Y., 1876); Lent v. Curtis, 14 Ohio Circ. Dec., 592, 597 (1902); Taylor v. Maule, 2 Walker, 539, 544 (Pa., 1864); see, also, Jones v. Hoard, 59 Ark., 42, 47 (1894); Griffin v. Marine Co., 52 Ill., 130, 148 (1869); Fraer v. Washington, 125 Fed., 280, 283 (U. S. C. C. A., Ind. Ter., 1903); Knight v. Orchard, 92 Mo. App., 466 (1901); *Re* Coatsworth, 37 App. Div., 295, 307 (N. Y., 1899); Cicalla v. Miller, 105 Tenn., 255 (1900); Brummet v. Campbell, 32 Wash., 358, 368 (1903); Wilkes v. Hunt, 4 Wash., 100, 102 (1892).]

[The plaintiff has the right, by virtue of the conditions in the lease, to remain in possession until the improvements are ascertained and paid for, with interest, inasmuch as the landlord refused to renew; but this does not excuse him from continuing to pay rent or taxes as provided in the lease. Hopkins v. Gilman, 47 Wis., 581, 590 (1879).]

[The lessee has an equitable lien for the value of the improvements at the termination of the lease, and can hold possession until paid. Where there is a provision that, if the lessor shall not be able to purchase, the lease shall be continued until he is able, will not give the lessor unlimited, but reasonable time to make payment. Where the property is ordered sold to satisfy the lien, it is not improper to postpone ascertainment of the value of the improvements until after the sale. Gray v. Cornwall, 16 Ky. L. R., 228 (1894).]

[See Ecke v. Fetzer, 65 Wis., 55, 65 (1886), as to the method of computing the amount payable where the tenant retains possession some time after the expiration of the lease.]

[In Speers v. Flack, 34 Mo., 101, 103 (1863), it is held that, unless there is a reservation of the right to retain possession, the time being definite, no such right exists.]

As to the nature of an appraisal, and the setting it aside for the misconduct of the appraisers, etc., see Van Cortland v. Underhill, 17 John., 405 (1819). [Smith v. Cooley, 5 Daly, 401, 409 (N. Y. C. P., 1874). In Graf v. Friedlander, 33 La. Ann., 188, 189 (1881), the agreement was held binding. Where there is no charge of fraud, the finding of the arbitrators will not be disturbed.]

That the covenant to renew does not necessarily imply a renewal with the same covenants as in the original lease, see Rutgers v. Hunter, 6 John. Ch., 215 (1822), applied to a covenant to pay for improvements. [Carr v. Ellison, 20 Wend., 178 (N. Y., 1838); Leary v. Hutton, 12 N. Y. Supp., 476 (1890); see, also, Kash v. Huncheon, 1 Ind. App., 361 (1890); Orphan Soc. v. Waterbury, 8 Daly, 35 (N. Y., 1878). Where a lease provides for renewing the lease upon the same conditions, a renewal does not affect the lessee's rights. Livingston v. Sulzer, 26 Supr. Ct. (19 Hun), 375, 381 (N. Y., 1879).]

For the construction of several special agreements to pay the appraised value of buildings, etc., see Lametti v. Anderson, 6 Cow., 302 (1826); Woodward v. Payne, 16 Cal., 444 (1860); Wray v. Rhinelander, 52 Barb., 553 (1868); s. c., 39 How. Pr., 299. See, also, Duffield v. Whitlock, 26 Wend., 55 (1841); s. c., 1 Hoff. Ch., 110, where the covenant for renewal was considered void for uncertainty. [Anderson v. Swift, 106 Ga., 748 (1899); Bass v. Metropolitan R. R. Co., 82 Fed., 857, 862 (U. S. C. C., Ill., 1897); Tuttle v. Leiter, 82 Fed., 947 (U. S. C. C., Ill., 1897); Smyth v. Stoddard, 203 Ill., 424 (1903), aff'g 105 Ill. App., 510 (1903); Pearson v. Sanderson, 128 Ill., 88 (1889), aff'g 28 Ill. App., 571 (1887); Gardner v. Watson, 18 Ill. App., 386 (1885); Hansen v. Meyer, 81 Ill., 321 (1876); Coles v. Peck, 96 Ind., 333 (1884); Stewart v. Pier, 58 Iowa, 15 (1882); Vorse v. Des Moines Marble Co., 104 Iowa, 541 (1898); Bullock v. Grinsted, 95 Ky., 261 (1894); Handy v. Aldrich, 168 Mass., 34 (1897); Mosely v. Allen, 138 Mass., 81 (1884); Hangsterfer v. Shafer, 130 Mich., 223 (1902); McAllister v. Reel, 53 Mo. App., 81 (1892); 59 Mo. App., 70 (1894); Chandler v. Oldham, 55 Mo. App., 139 (1893); Newhoff v. Mayo, 48 N. J. Eq., 619 (1891); Schoellkopf v. Coatsworth, 166 N. Y., 77 (1901), aff'g 55 App. Div., 331 (1900); Smith v. St. Philip's Church, 107 N. Y., 610 (1888); Finkelmeier v. Bates, 92 N. Y., 172 (1883), aff'g 48 N. Y. Super., 433 (1882); Neiderstein v. Cusick, 178 N. Y., 543 (1904), reversing 83 App. Div., 36 (1903); Howe's Cave Ass'n v. Houck, 73 Supr. Ct. (66 Hun), 205 (N. Y., 1892); Bates v. Johnston, 65 Supr. Ct. (58 Hun), 528 (1890), aff'd 126 N. Y., 681 (1891); Morton v. Weir, 12 Supr. Ct. (5 Hun), 177 (N. Y., 1875); *Re* Henshaw, 75 N. Y. Supp., 1047 (1902); Thompson v. Rose, 8 Cowen, 266 (N. Y., 1828); Elevator Co. v. Brown, 36 Ohio St., 660 (1881); Parker v. Page, 41 Ore., 579 (1902); East Sugar-Loaf Co. v. Wilbur, 5 Pa. Dist., 202 (1895); Bream v. Dickerson, 21 Tenn., 126 (1840); Allen v. Gates, 73 Vt., 222, 227 (1900); King v. Wilson, 98 Va., 259 (1900); Ward v. Toronto, 29 Ont., 729 (1898); Toronto Trusts Corp. v. White, 3 Ont. Law, 519 (1902); Nudell v. Williams, 15 Up. Can. C. P., 348 (1865); Sears v. Saint John, 18 Can., 702 (1890), aff'g Saint John v. Sears, 28 N. Brunsw., 1 (1889); Smith v. Gilbert, 18 N. Brunsw., 211 (1878); Irvin v. Simonds, 11 N. Brunsw., 190 (1864); Rolleston v. New (1858), 4 Kay & J., 640; Grey v. Cuthbertson (1785), 2 Chitty's R., 482; Malmsbury Min. Co. v. Tucker, 3 Vict. L. R. (Law), 213 (1877); see, also, National Waterworks Co. v. Kansas City, 62 Fed., 853 (U. S. C. C. A., Mo., 1894).]

As to when the appraised value of buildings, etc., is a lien upon the demised property, see Copper v. Wells, 1 N. J. Eq., 10, 18 (1830); Berry v. Van Winkle, 2 Id., 269, 390 (1839); Whitlock v. Duffield, 2 Edw. Ch., 466 (1834). [Mullen v. Pugh, 16 Ind. App., 337, 339 (1896); Leahy v. Reynolds, 4 Ky. L. R., 995 (Super., 1883); The Confiscation Cases, 1 Wood, 221, 227 (U. S. C. C., La., 1872); Swift v. Sheehy, 88 Fed., 924 (U. S. C. C., Mo., 1898); Fowler v. Mutual Life Ins. Co., 35 Supr. Ct. (28 Hun), 195 (N. Y., 1882); Anderson v. Ammonett, 77 Tenn., 1 (1882); Hite v. Parks, 2 Tenn. Ch., 373 (1875); see, also, White Stone Quarry Co. v. Belknap

Stone Co., 13 Ky. L. R., 244, 247 (1891); New York Dyeing Est. v. DeWestenberg, 53 Supr. Ct. (46 Hun), 281, 282 (N. Y., 1887). Where a lease provides that structures erected by the lessee might be removed at his option, and that they should not be considered as attached to the land, he does not acquire any equitable lien upon the land for their value which would entitle him to require a sale of the property. Phillips v. Reynolds, 20 Wash., 374, 377 (1898).]

[See Ward v. Hall, 34 N. Brunsw., 600 (1899), in regard to an option by the lessor to pay for improvements or renew.]

[A lease contained the following clause: "Provided that the said lessee shall have the privilege at the expiration of the term hereby granted of removing any building erected on the said lands hereby demised, unless the same are purchased by the lessor at a price to be fixed by the said lessee." *Held*, that the lessor must signify his intention to buy before the lessee is bound to fix the price; and he must make his election to purchase before the expiration of the term. Gray v. McLennan, 3 Man., 337, 348 (1886).]

[Where the lessor fails to give notice of his option to terminate the lease, and pay the appraised value of improvements, it is unnecessary to appraise their value. Eberts v. Fisher, 54 Mich., 294, 298 (1884).]

[A lease provided for a right of renewal by the lessee, with a covenant that if the lessor and lessee failed to agree as to the rental, the lessor should purchase the improvements, etc. *Held*, that the provision embraced a failure by the lessee to renew the lease, as the lessee could have demanded a renewal and at the same time refused to agree to any fair rental. Carpenter v. Pocasset Mfg. Co., 180 Mass., 130 (1901).]

[Where a lease for twelve years provides that the lessor will buy structure erected by the lessee, or extend the lease, an extension for one day by the lessor will not defeat the lessee's rights. Phillips v. Reynolds, 20 Wash., 374, 377 (1898).]

[Where the lessor has a right of election to grant a renewal, or pay the value of the house, he has made his election when an appraisement is had under the covenant of renewal, and has no right afterwards to claim the building in lieu of renewing. Crosby v. Moses, 48 N. Y. Super., 146, 148 (1882).]

[Where a lease provided for the erection of a building by the lessee, and made it optional with the landlord to buy the building at the expiration of the term or continue the lease for another term upon the same conditions, the building became the property of the landlord upon the expiration of the second term. Peirce v. Grice, 92 Va., 763, 767 (1896).]

[Where a lessee has a right to remove buildings upon the termination of the lease unless the lessor elects to retain them at their fair value, a railroad company, seeking to condemn, is given the same right of election. *Re* Morgan R. R. Co., 32 La. Ann., 371, 378 (1880).]

[As against execution creditors of the lessee, the lessors' option to buy the tenant's fixtures at the end of the term gave them no title to such

As to what particular articles, for which the purchaser or tenant may be called upon to pay, are to be included in the stipulation (sometimes occurring in agreements of sale, and in demises of premises) that "the fixtures are to be taken at a valuation," there seems to have been no decisions. On this subject Mr. Ferard [13] makes the following observations: "With respect to the precise import of these terms in different cases, there is very little assistance to be derived from the authorities; and the practice of the individuals who are usually referred to on these occasions, seems to be governed by no uniform or very definite rule. It would seem, however, that when a stipulation of this kind occurs on the *sale* of a house, those things only are, in strictness, to be comprehended in the valuation, which would be deemed personal assets as between *heir and executor, [*352] and which would not pass with the inheritance as part of the freehold of the house.[14]

fixtures until they were appraised and accepted. Seitzinger v. Marsden, 2 Pennypacker, 463, 473 (Pa. Supr., 1882).]

[A liquidator has no greater right against the landlord than the tenant would have. Pender v. Bathgate Oil Co. (1887), 24 Scot. Law Rep., 519, 520 (1887).]

[In the absence of proof, the right to compensation will be held to have been waived or satisfied after thirteen years. Unz v. Price, 22 Ky. L. R., 791, 792 (1900).]

[A stipulation in the lease "that in case of failure of the lessor's title to the lot, payment was to be made for all the lessee's permanent and valuable improvements thereon," does not figure where there is no failure of title. Douglass v. Anderson, 28 Kan., 262, 264 (1882).]

[Where a lease requires the lessee to erect buildings, and there is no agreement for their removal, he has no right to remove them. Peiree v. Grice, 92 Va., 763, 767 (1896).]

[In *Re* Dawdy (1885), 15 Q. B. D., 426, the agreement was held to be for the appointment of valuers, not arbitrators.]

[See M'Elroy v. Brooke (1885), 16 L. R., Ire., 46, as to usage.]

[In an action of trover, after the expiration of a lease, for machinery placed upon the premises by the tenant, it is no defense that there is an agreement in regard to valuation, where the plea does not allege that the lessors are ready and willing to perform the agreement. Pawtucket Inst. v. Almy, 13 R. I., 68, 70 (1880). But actual tender is unnecessary. White Stone Quarry Co. v. Belknap Stone Co., 13 Ky. L. R., 244, 246 (1891).]

[13] Ferard Fixt., *221.

[14] See Hitchman v. Walton, 4 M. & W., 409 (1838).

[A grantee of a brewery agreed to pay for the "fixed plant" according

"When the like stipulation occurs upon a *demise* of premises, it must, it is conceived, be interpreted to mean, that all those articles are to be valued to the incoming tenant which would be fixtures as between a landlord and tenant, and which the tenant would be at liberty to remove if he had himself put them up during the term. It is apprehended, therefore, that the tenant will not be bound to pay for anything but what properly falls within the rule here suggested.

"So, where a tenant by assignment of his lease pending the term, or at his outgoing, disposes of his fixtures under a similar agreement, he may be considered as transferring to the purchaser all those articles which he would have been entitled to remove from the premises, either by reason of having taken them as *fixtures*, or as having himself erected them during the term.

"But in all these cases the *intention* of the parties is the true criterion to be consulted; and this intention is to be collected from the general nature of the contract, and from the description of the premises, and the purposes for which they are usually occupied. It may also be inferred from a custom prevailing in the particular district, and with reference to which the parties may be supposed to have contracted."

to a valuation to be made. The question arose whether a chimney-shaft, a partition and staging ought to be included in the valuation. *Held*, that they should not, as "plant" was dead stock which assisted in production, but did not act, being that through, and by means of, and in which, action took place, and included pipes, vats, and the like. *Re* Nutley (1894), 96 Law Times, 585.]

CHAPTER X. [*353]

OF THE SEIZURE AND SALE OF FIXTURES ON EXECUTION.

I. As Against the Owner of the Fee.

Although, as will be seen in the next section, whatever may be removed by the tenant as between landlord and tenant, may be taken in execution as against the tenant, yet as against one who is the owner of the estate in fee as well as of the fixtures, they are part of the freehold and cease to be goods and chattels, and therefore may not be seized as goods and chattels by the sheriff under a *fi. fa.* as against the owner of the fee.[1] And the

[1] See Year Books, 21 Hen. VII., 27 (1506); 20 Hen. VII., 13 b (1504); Cro. Eliz., 374; Owen, 70; Place v. Fagg, 4 Man. & Ry., 277 (1829); s. c., 7 L. J., K. B., 195, machinery in a grist mill; Winn (or Wynne) v. Ingleby (or Ingilby), 5 B. & Ald., 625 (1822); s. c., 1 D. & R., 247, set-pots, ovens and ranges; Rice v. Adams, 4 Harring., 332 (1845), a steam-engine, boiler, cranes, cupola and fan erected in an establishment for manufacturing steam-engines; *Ex parte* Reynal, 2 M. D. & DeG., 443, 461 (1841); Green v. Phillips, 26 Gratt., 752 (1875), machinery in a sash, door and blind factory. See, also, Steward v. Lombe, 1 B. & B., 506 (1820); s. c., 4 Moore, 281. [Off v. Finkelstein, 200 Ill., 40, 46 (1902); Citizens' Bank v. Crooks, 21 La. Ann., 324 (1869); Humphreys v. Newman, 51 Me., 40 (1863); Towne v. Fiske, 127 Mass., 125, 132 (1879); McAuliffe v. Mann, 37 Mich., 539, 542 (1877); Jones v. Bull, 85 Tex., 136 (1892); Philion v. Bisson, 23 Low. Can. Jur., 32 (1878); Dixon v. Mackay, 24 Can. Law T., Occ. N., 28 (Man., 1903); see, also, Allen v. Scott, 38 Mass., 25, 28 (1838); Landell v. Harrison, 16 Phila., 85 (1882).]

[The following are not subject to levy and sale as chattels: Buildings. Davis v. Eastham, 81 Ky., 116 (1883); Whiteman v. LeBlanc, 28 La. Ann., 430 (1876); Freeman v. Lynch, 8 Neb., 192 (1879); Lipsky v. Borgman, 52 Wis., 256 (1881); Bald v. Hagar, 9 Up. Can. C. P., 382, although resting upon blocks. Saw-mill, grist-mill, and boiler. Tison v. Tanichill, 28 La. Ann., 793, 794; Davis v. Eastham, 81 Ky., 116 (1883). A portable engine affixed to keep it steady, although it is the intention of the landowner to substitute another. Cross v. Barnes (1877), 46 L. J., Q. B., 479. Main driving belt. Friedly v. Giddings, 119 Fed., 438, 446 (U. S. C. C.,

Vt., 1902). Engines, boilers, heaters, iron smoke-stacks, electric dynamo, electric wiring, shafting and belting. Seiberling v. Miller, 106 Ill. App., 190 (1902), aff'd in 207 Ill., 443 (1904); New York Security Co. v. Saratoga Light Co., 95 Supr. Ct. (88 Hun), 569 (N. Y., 1895). Machinery permanently attached. Willis v. Moore, 66 Tex., 628 (1886). Mining machinery, although moved from place to place over the lot as the mineral is exhausted. Rogers v. Ontario Bank, 21 Ont., 416 (1891). Steam-pipes are not subject to levy, although the radiators, with their valves, standing upon the floor, and to which the pipes are screwed, are subject to levy. National Bank v. North, 160 Pa. St., 303 (1894). An iron pier. Harriman v. Rockaway Beach Co., 5 Fed., 461 (U. S. Dist. Ct., N. Y., 1880). A fence. Watterson v. Bonner Co., 19 Mont., 554, 556 (1897). A statue resting upon a base placed upon a stone foundation, all cemented together constituting a solid mass, with stone coping intended by the landowner to be permanent. Oakland Cem. Co. v. Bancroft, 161 Pa. St., 197 (1894).]

[Where title by occupation of public land is an interest in real estate, fixtures thereon can not be levied upon. Roseville Min. Co. v. Iowa Gulch Co., 15 Colo., 29 (1890).]

[The fact that the owner of the fee is also lessee of two-thirds of the minerals therein, does not make fixtures subject to execution. Ritchie v. McAllister, 14 Pa. Co., 267, 270 (1894).]

[A creditor of the community can not seize the buildings placed by the community upon the wife's plantation separate and apart from the land of the wife. Whiteman v. LeBlanc, 28 La. Ann., 430 (1876).]

[Where two railroad spike-machines were, after being attached, annexed to the realty, a subsequent levy and sale was invalid; and even if regarded as personal property, the creditor by leaving them in the possession of the debtor for two years releases his lien. McFadden v. Crawford, 36 W. Va., 671 (1892). Where articles levied upon are, with the consent of the execution-creditor, attached to the freehold so as to become a part of the realty, the lien of the execution is thereby released. Patton v. Moore, 16 W. Va., 428, 439 (1880).]

See, however, Burk v. Baxter, 3 Mo., 207 (1833), where, however, the stills were considered personal property.

Fixtures demised with a paper-mill and used by the tenant in the manufacture of paper, are not liable to be seized under an extent for duties upon paper owed by the tenant to the crown, as utensils for the making of paper, etc., in the custody of the maker thereof, within the statute, 34 Geo. III., c. 20, s. 27. It seems that even if the fixtures belonged to the tenant instead of the landlord, and were removable as against the landlord, they would not be "utensils" within the act. The articles in question were presses fixed to the ground, heaters and pipes, copper and furnace fixed in brick-work, stuff-chests moving in a groove in sleepers put in the ground from which they could not be removed without removing the sleepers and unscrewing the groove, pumps and engines, the former fixed to the latter which were fastened to the ground by beams, a wooden shoot and trunk fixed to machinery attached to the ground, water-wheels, fly-wheel and pit-wheel, and

rule is the same whether there is an actual *annexation, [*354] or only a constructive annexation of the article to the realty, as in the case of mill-stones, movable articles which are usually valued as between out-going and in-coming tenants.[1]

three engines, all which the court considered to be fixtures. Att'y Gen. v. Gibbs, 3 Y. & J., 333 (1829).

In Taffe v. Warnick, 3 Blackf., 111 (1832), the opinion is expressed that the same rule should be applied between debtor and creditor that is applied between landlord and tenant, and this irrespective of the question whether the debtor is the owner of the real estate to which the fixture is annexed, or only a tenant; but the point does not appear to have been necessary to the decision of that case, the article in question being a carding-machine "in no manner fastened or fixed to the building, except as it stood upon the floor in its usual place of operation;" and the *dictum* itself seems clearly contrary to the general current of authority, and does not appear to have been approved by any subsequent cases.

See, also, Krueger v. Pierce, 37 Wis., 269 (1875), where without determining whether the property in question had become a part of the realty, it was *held* that lath, shingles and lumber obtained by a debtor for the purpose of repairing the dwelling-house occupied by him as a homestead, and actually deposited upon the lot on which such dwelling was situated, were exempt from seizure on attachment.

[Buildings, whether used for business or rented, upon a homestead, are exempt. Sever v. Lyons, 170 Ill., 395, 398 (1897); Stevens v. Hollingsworth, 74 Ill., 202, 208 (1874). Likewise, a fence. Watterson v. Bonner Co., 19 Mont., 554, 556 (1897).]

[A chattel mortgage upon fixtures attached to a homestead, was attempted to be foreclosed in a court which had no jurisdiction in foreclosures of real estate mortgages. *Held*, that, the fixtures being realty, the court had no jurisdiction; and the fixtures being a part of the homestead, were not subject to conveyance except in the manner provided by statute for homesteads. Gentry v. Bowser, 2 Tex. Civ. App., 388 (1893).]

[Machinery mortgaged as chattels and attached to a homestead by the mortgagor, becomes exempt as against the mortgagee until foreclosure. Low v. Tandy, 70 Tex., 745, 749 (1888).]

[A landowner can not, by a chattel mortgage of machinery attached to his homestead, give the mortgagee any rights as against the wife of the mortgagor. Phelan v. Boyd, 14 S. W., 290, 294 (Tex., 1890).]

[Machinery, which is a part of the realty, can not be claimed by the judgment debtor as exempt personal property. Bradley v. Ritchie, 12 Pa. Dist., 658 (1903).]

[1] Place v. Fagg (*supra*). [See Grant v. Wilson, 17 Up. Can. Q. B., 144, 147.]

[The following articles can not be attached or levied upon as personal property: A leather belt for transmitting power from a steam engine, the latter being real estate. Gidding v. Freedley, 128 Fed., 355 (U. S. C. C.

A., Vt., 1904). Boards in use as a permanent floor in a corn barn. Hackett v. Amsden, 57 Vt., 432, 436 (1885). See, also, Grimshawe v. Burnham, 25 Up. Can., Q. B., 147 (1865), as to mill stones seized for taxes while taken from their place for the purpose of being levelled.]

In the case of the Congregational Society of Dubuque v. Fleming, 11 Iowa, 533 (1861), a bell had been used in the belfry of an old church edifice. A new building was erected with a tower for the bell, and the old building sold, the bell being reserved from the sale. The bell with the framework was removed from the old building and placed upon the lot belonging to the society where the new church was erected and immediately in front, where it remained for about a year, being used at all times when required for church purposes. Defendant having an execution against the society, made a memorandum of levy and notified one of the trustees, but did not take actual possession of the bell. About two weeks afterwards when it was advertised for sale, the church authorities raised it into the tower, but before it was fully fastened defendant took actual possession thereof and was about to remove it when replevied. *Held,* that the bell never ceased to be a fixture, and was not subject to levy as personal property. "The placing it in this position and this use indicate unmistakably the intention of the society to affix it to the realty, to render it a permanent accession to the land; to appropriate it to the purpose designed, and to divest it of its original chattel character. And though it be admitted that the mere intent to thus convert it without some act, would not be sufficient, yet the act and use indicate the intention and have the effect of changing the character."

See, also, Art. 468, Civil Code La.; Beard v. Duralde, 23 La. Ann., 284 (1871).

[An engine and boiler hauled into a mill-yard by the owner with the *bona fide* intention of attaching them to the mill, and they are necessary for the motive power, are not liable to the levy of an execution as personal property. Patton v. Moore, 16 W. Va., 428, 439 (1880); likewise as to suitable materials deposited upon a farm for the purpose and with the intention of building necessary fences thereon. Hackett v. Amsden, 57 Vt., 432, 436 (1885).]

[A granary, removed by a trespasser from a homestead, does not cease to be exempt, and a judgment obtained against the trespasser may be treated as a judgment for exempt personal property. Wylie v. Grundysen, 51 Minn., 360, 362 (1892).]

[A constructive severance is insufficient to render an article subject to levy as personalty. Davis v. Eastham, 81 Ky., 116, 117 (1883); McNeil v. Moore, 7 Tex. Civ. App., 536, 539 (1894); Carson v. Simpson, 25 Ont., 385 (1894).]

[Where a factory was destroyed by fire, but certain machinery was saved, which, with building material upon the land, was sold by the sheriff as chattels, and were treated by all of the creditors as severed, and, later, the land being sold under decree, the vendee thereof did not interfere with the buyers at the execution sale, but recognized its validity, and an

*What constitutes a constructive annexation has been [*355] already considered[1] and need not here be repeated.

With reference to locomotive-engines, cars, and other rolling stock of railroad companies, the better opinion is, as has been already observed, that they are mere personal chattels and hence subject to sale on *fi. fa.* as such.[2]

Growing grass, trees and fruit, not being the annual production of labor and of the cultivation of the earth, are also parcel of the land and cannot be seized under an execution as chattels until severed from the land,[3] though, as has been seen in

assignee of the purchaser of the land also sought to purchase such property previously sold as chattels, such assignee, after receiving a deed, will not be permitted to claim such chattels as fixtures. Banfill v. Twyman, 71 Ill. App., 253 (1896), aff'd 172 Ill., 123 (1898). See Walton v. Jarvis, 14 Up. Can. Q. B., 640; 13 Up. Can. Q. B., 616, as to the engine and boiler of a burned saw-mill.]

[1] *Ante*, p. *33.

[2] See Beardsley v. Ontario Bank, 31 Barb., 619 (1859); Stevens v. Buffalo & New York City R. R. Co., 31 Barb., 590 (1858); Hoyle v. Plattsburgh & Montreal R. R. Co., 54 N. Y., 314 (1873); s. c., 51 Barb., 45; 47 Barb., 104; Randall v. Elwell, 52 N. Y., 521 (1873); s. c., 11 Am. Rep., 747; Chicago & N. W. Railway Co. v. Ft. Howard, 21 Wis., 44 (1866). [Boston, C. & M. R. R. v. Gilmore, 37 N. H., 410, 421 (1858); Williamson v. New Jersey S. R. R. Co., 29 N. J. Eq., 311 (1878); see, also, Coe v. Columbus, P. & I. R. R. Co., 10 Ohio St., 372, 379 (1859). Railroad cars are, for the purpose of attachment, personal property. Pub. Sts., c. 161, §§ 38, 39. Hall v. Carney, 140 Mass., 131, 132 (1885). Coal, stored in sheds, for the use of a railroad, can be levied upon as personal property. Chicago & N. W. R'y Co. v. Ellson, 113 Mich., 30 (1897).]

See *contra*, Farmers' Loan and Trust Co. v. Hendrickson, 25 Barb., 484 (1857); Id. v. St. Jo., etc., R'w'y Co., 3 Dill. C. C., 412 (1875); Palmer v. Forbes, 23 Ill., 312 (1860); Hunt v. Bullock, 23 Ill., 320 (1860); Titus v. Mabee, 25 Ill., 257 (1861); Titus v. Ginheimer, 27 Ill., 462 (1861); see *ante*, p. *34, *et seq.* [Elizabethtown & P. R. R. Co. v. Elizabethtown, 75 Ky., 233, 238 (1876); Grand Trunk R'y Co. v. Eastern Townships' Bank, 16 Low. Can., 173, 175 (1865).]

[A distinction is made between rolling-stock of an ordinary steam railway, which may be hauled to any part of the country, and a trolley-car of an electric railway, which is part of one vast machine. Kirkpatrick v. Cornwall Street R'y Co., 2 Ont. Law, 113 (App., 1901).]

[3] See Bank of Lansingburgh v. Crary, 1 Barb., 542 (1847); Adams v. Smith, Breese, 221 (1828); Osborne v. Rabe, 67 Ill., 108 (1873), where the *fi. fa.* was attempted to be levied on nursery trees. [State v. Gemmill, 1 Houston, 9, 16 (Del., 1855); Sparrow v. Pond, 49 Minn., 412 (1892); Late

the chapter on Emblements, it is otherwise with *fructus industriales.*

As has been already stated, a creditor cannot by simply levying his execution on a fixture, or by levying on the land and excepting as personal property a building or other fixture thereon belonging to the owner of the land on which it is situated, there being no actual severance, change the character of his debtor's estate and convert a part of it into personalty.[4] Nor can the execution debtor by parol turn out as chattels for purpose of levy growing grass, fruit or trees, or fixtures annexed to his land, nor without a severance, authorize the levy of execu- [*356] tion thereon *as chattels; and, if attempted to be done, the levy is void.[5]

v. McLean, 2 Nova S. Dec., 69 (1870). But see, as to nursery trees, Batterman v. Albright, 122 N. Y., 484 (1890).]

[Grass is not open to attachment although fit for harvest. Rogers v. Elliott, 59 N. H., 201, 202 (1879).]

[A growing crop of peaches requiring periodical expense, industry and attention in its yield and production, are *fructus industriales,* and can be levied upon. The trees are *fructus naturales.* State v. Fowler, 88 Md., 601, 609 (1898).]

[4] See *ante,* p. *44, and notes. See, also, Pemberton v. King, 2 Dev., 376 (1830). [Off v. Finkelstein, 200 Ill., 40 (1902).]

[When an execution creditor levies upon a fixture and takes steps to regain possession thereof as personal property, he is estopped to deny that it was personal property. Jones v. Bull, 90 Tex., 187, 194 (1896).]

[5] See Bank of Lansingburgh v. Crary, 1 Barb., 542 (1847); and the cases on the subject of the Statute of Frauds in the chapter on Emblements (*ante,* p. *268). [See Levinstein v. Born, 18 Phila., 265, 266 (1886); but see Budden & Knight, 3 Que. L. R., 273, 282 (1877).]

The doctrine of the text is believed to be the better opinion, though it seems opposed to those cases collected in that chapter holding the sale by parol of trees, grass, etc., under certain circumstances not to be within the Statute. See, however, Wetherby v. Foster, 5 Vt., 136 (1832); Piper v. Martin, 8 Penn. St., 206 (1848); Mitchell v. Freedley, 10 Penn. St., 198 (1849). In the last named case it was *held,* that where the sheriff with the verbal consent of the owner of the land sold certain fixtures (consisting of machinery for spinning cotton yarn) under a *fi. fa.* as personalty, the fixtures remaining annexed after the sale, and the purchaser paid the price and took possession thereof, his title was good as against a subsequent vendee with notice, of the land before actual severance of such fixtures. The court in rendering their judgment seem to rely principally upon the fact that by the consent of the debtor to the sale as chattels on *fi. fa.,* he had estopped himself from asserting title.

It should be remarked in concluding this section, that machinery in cotton and woolen-mills, or other similar manufactories, consisting of carding-machines, looms, etc., secured to the floor by cleats nailed around the feet, or by screws or bolts passing through the feet into the floor, or in other similar ways, so attached to keep them steady in their positions, and capable of removal without injury to themselves or the building, and which, as has been seen in a preceding chapter,[6] are in some States held to be mere chattels; and also other articles which though more or less attached to the land are held to be mere chattels, are in those States also held to be subject to seizure and sale on *fi. fa.* as chattels, notwithstanding such annexation.[7]

[6] Chap. 9, p. *294.

[7] Teaff v. Hewitt, 1 Ohio St., 511 (1853); Murdock v. Gifford, 18 N. Y., 28 (1858); Sturgis v. Warren, 11 Vt., 433 (1839); Wetherby v. Foster, 5 Vt., 136 (1832), potash-kettles set in arches in the usual way; Bartlett v. Wood, 32 Vt., 372 (1859), lathes, drills, punches, and saws fastened to the building; Fullam v. Stearns, 30 Vt., 443 (1859), machinery in a bedstead-manufactory and grist-mill; Hill v. Wentworth, 28 Vt., 429 (1856), machinery in a paper-mill. See, also, Gale v. Ward, 14 Mass., 352 (1817); Taffe v. Warnick, 3 Blackf., 111 (1832); Tobias v. Frances, 3 Vt., 425 (1830). [Clore v. Lambert, 78 Ky., 224 (1879), an engine and machinery attached by bolts and screws, although a portion of the floor was torn up and a portion of the wall removed; Lapene v. McCan, 28 La. Ann., 749 (1876), boilers attached with brick and cement; Scheifele v. Schmitz, 42 N. J. Eq., 700 (1887), cumbersome articles in a brewery, held in position solely by their own weight, or only slightly connected, as by belting; Penn Mut. Ins. Co. v. Semple, 38 N. J. Eq., 575 (1884); Vail v. Weaver, 132 Pa. St., 363 (1890), electric light machinery; Carseallen v. Moodie, 15 Up. Can. Q. B., 304; Canada Sav. Co. v. Merchants' Bank, 3 Man., 285 (1886), heavy planer not affixed; see, also, Lea v. Shakespeare, 10 Mont. Co. (Pa.), 171 (1894); *Ex parte* Dickinson, 29 S. C., 453 (1888).]

See, however, as to the point that articles so annexed are fixtures, the cases cited *ante*, chap. 9, p. *275. See, also, Kittredge v. Wood, 3 N. H., 506 (1826); Despatch Line v. Bellamy Manuf'g Co., 12 N. H., 233 (1841); Baker v. Davis, 19 N. H., 334 (1849), where the case of Gale v. Ward is questioned. [McDonald v. Weeks, 8 Gr. Ch., 297 (Ont., 1860).]

[A ferry boat, buoys, chain, rope and all other fixtures thereto attached, are subject to levy as chattels, although the chain by which the boat is run is fastened to the boat and to an island. Cowart v. Cowart, 71 Tenn., 57 (1879).]

[*357] *II. As Against a Tenant.

According to the early authorities it seems to have been the general rule that fixtures, whether annexed by the owner of the soil or by a tenant, were not subject to levy and sale on *fi. fa.* as chattels.[8] But in the case of tenants, since the decision of Poole's Case,[9] the rule has been well settled that during the term the tenant's trade fixtures removable by him as against his landlord may be levied upon and sold as chattels under a *fi. fa.* against the tenant,[10] and may be removed by the pur-

[8] See Day v. Austin (or Bisbitch), Owen, 70 (1595); s. c., Cro. Eliz., 374; Year Books, 21 Hen. VII., 27 (1506); 20 Hen. VII., 13 b (1504).

[9] 1 Salk., 368 (1703); s. c., Holt, 65.

[10] Pillow v. Love, 5 Hayw., 109 (1818); Lemar v. Miles, 4 Watts, 330 (1835), a steam-engine; Hey v. Bruner, 61 Penn. St., 87 (1869), a steam-engine and boiler; Heffner v. Lewis, 73 Penn. St., 302 (1873), iron rails laid on a track in a tunnel by the lessee of coal lands; Hallen v. Runder, 1 Cr. M. & R., 275 (1834), per Parke B. See, also, Thropp's Appeal, 70 Penn. St., 395 (1872) (cited *ante*, p. *146); O'Donnell v. Hitchcock, 118 Mass., 401 (1875); *ante*, p. *15, note. [See, *ante*, p. *92. Freeman v. Dawson, 110 U. S., 264, 270 (1883); Morey v. Hoyt, 62 Conn., 542, 558 (1893); Havens v. West Side Light Co., 17 N. Y. Supp., 580, 582 (1892); Pratt v. Keith, 5 Montg. Co. (Pa.), 113 (1889); Hughes v. Towers, 16 Up. Can. C. P., 287 (1865); Antrim v. Dobbs (1891), 30 L. R., Ire., 424, rails of a tramway over land to reach an iron mine by a lessee of the mining rights. But see State v. Marshall, 4 Mo. App., 29, 33 (1877).]

Perhaps it may be thought that in strictness it ought to be said that the fixtures may be levied upon, *severed* and sold as chattels on a *fi. fa.*, etc. In Minshall v. Lloyd, 2 M. & W., 450, 459 (1837), per Parke, B., it is said: "The right of a tenant is only to remove during his term the fixtures he may have put up, and so make them cease to be any longer fixtures. That right of the tenant enables the sheriff to take them under a writ, for the benefit of the tenant's creditor. I assent to the doctrine laid down in Coombs v. Beaumont and Boydell v. McMichael, that such fixtures are not goods and chattels within the bankrupt law, though they are goods and chattels when made such by the tenant's severance, or for the benefit of execution creditors." In Pemberton v. King, 3 Dev., 376 (1830), it was *held*, that as between a tenant and his creditors an engine actually fixed to and in the soil and which could not be removed without tearing down the mason-work and house which covered it, were until severance a part of the realty; and that although the tenant might have a right to sever the fixture from the freehold, until that right was exercised by him or the officer the thing was merged in the soil, and a sale of it as personalty while so annexed, was void. It must be sold by the officer in the state and as the

*chaser during the existence of the term. Indeed it may [*358] be regarded as a general rule, that all tenant's fixtures which are removable as against the landlord, whether erected for the purpose of trade or for other purposes, are in favor of execution creditors of the tenant to be considered as goods and chattels. But where the tenant has no right to disannex fixtures, whether by reason of their nature or the manner of their annexation or on account of his having renounced the right of removal by contract with the landlord, the sheriff has no right to take them in execution on a *fi. fa.*, his right being only commensurate with the right of the lessee.[1] In like manner, where

kind of property it is at the time of sale. The act of levy worked no change in its nature.

This distinction seems, however, to have been generally disregarded, and does not appear to be supported by any subsequent authorities. The real nature of the contract in such a case seems to be a sale of the right of removal only. See the cases cited in ch. 9, § 5, *In re* Statute of Frauds; and the cases cited at the beginning of this note.

[Steers v. Daniel, 4 Fed., 587, 598 (U. S. C. C., Tenn., 1880), related to a cotton-compress weighing many tons, fixed to the soil in a most substantial manner, with deep foundations. Said Hammond, J., in delivering the opinion of the court: "It is sometimes loosely said in the books that whatever the tenant can remove must be levied upon and sold as personal property. This may be so as to mere utensils of trade, or trade 'fixtures,' which are portable, and not seriously injured or rendered useless by severance. But not so as to structures like this. No doubt the press is valuable when severed, and can be placed on other land, but the mere cost of taking down and putting up is so great, that its value standing and ready for work is far greater, and it cannot be that the debtor can be compelled to submit to a mode of levy and sale which so deteriorates his property. If so, it could be severed and sold on an execution for any small amount."]

[1] Dumergue v. Rumsey, 2 H. & C., 777 (1863); s. c., 12 W. R., 205; 33 L. J., Exch., 88; 10 Jur. (N. S.), 155; 9 L. T. (N. S.), 775; Rex v. Topping, McClell. & Y., 544 (1825); Fisher v. Saffer, 1 E. D. Smith, 611 (1852). [Little Valeria Co. v. Lambert, 15 Colo. App., 445 (1900); McAuliffe v. Mann, 37 Mich., 539, 541 (1877); Donnewald v. Turner Co., 44 Mo. App., 350 (1891); Friedlander v. Ryder, 30 Neb., 783, 787 (1890); Barker v. Cincinnati Brick Co., 4 Ohio Dec., 270, 271 (1896); Harris v. Kelly, 13 Atl., 523, 527 (Pa. Super., 1888); Hammond v. Martin, 15 Tex. Civ. App., 570 (1897); Hughes v. Towers, 16 Up. Can. C. P., 287 (1865); see, also, Webster Lumber Co. v. Keystone Lumber Co., 51 W. Va., 545.]

[The right to attach fixtures is lost after re-entry for non-payment of rent. Morey v. Hoyt, 62 Conn., 542, 547 (1893).]

by the agreement of the parties a house or other structure erected upon the land of another is to be the personal property of the party erecting the same, who accordingly has the right of removal, such erection may be levied on and sold on a *fi. fa.* against the owner thereof as a chattel.[2] And it is immaterial that the

[An agreement that, in a certain event, the landlord shall have the privilege of taking the tenant's fixtures at a valuation, does not prevent their being taken in execution when that event has not occurred. Seitzinger v. Marsden, 2 Pennypacker, 463, 474 (Pa. Supr., 1882).]

[2] Foster v. Mabe, 4 Ala., 402 (1842). See, also, State v. Bonham, 18 Ind., 231 (1862). See, however, *dictum* of Burrough, J., in Steward v. Lombe, 1 B. & B., 506 (1820); s. c., 4 Moore, 281. [Broaddus v. Smith, 121 Ala., 335, 339 (1898); Walton v. Wray, 54 Iowa, 531, 534 (1880); Hershberger v. Johnson, 37 Ore., 109 (1900); Letchman Chetty v. Hassan Kudus, 4 Kyshe, 675, 676 (Straits Set., 1890); see, also, Morey v. Hoyt, 62 Conn., 542, 551 (1893); Young v. Baxter, 55 Ind., 188, 194 (1876); Tuttle v. Merchant's Nat. Bank, 19 Mont., 11, 20 (1896); Dodge v. Beattie, 61 N. H., 101, 105 (1881); Wick v. Bredin, 189 Pa. St., 83 (1899); Advance Coal Co. v. Miller, 4 Pa. Dist., 352, 356 (1895); Haney v. Milliken, 2 Tex. Ct. of App., Civ., § 722 (1884); Dixon v. Mackey, 38 Can. Law J., 653 (Man., 1902). But see Thomas v. Morasco, 5 Pa. Dist., 133 (1895).]

[Rails temporarily laid by contractors in building a railroad, and which belong to them, and which they are about to remove, are attachable as personal property. Fifield v. Maine Cent. R. R. Co., 62 Me., 77, 80 (1873).]

[Where a fixture was left upon land by a tenant surrendering possession, under an agreement that the landlord was to undertake its sale to a person negotiating for the land, it can be levied upon by creditors of the tenant. Torrey v. Burnett, 38 N. J. Law, 457 (1875).]

[A brick house, with granite and brick foundations, well built into the ground, which was sold independent of the land, is, as to an execution creditor, a "fixture" and a personal chattel under the Bills of Sale Ordinance. Mootyah Chetty v. Yacob, 4 Kyshe, 568, 569 (Straits Set., 1890).]

[Machinery, buildings, fixtures, etc., which, by agreement, the tenant had a right to remove at the expiration of his term, were, during the term, properly sold as real estate. Hyatt v. Vincennes Nat. Bank, 113 U. S., 408 (1884); Dean v. Pyncheon, 3 Pinney, 17, 25 (Wis., 1850).]

[A building erected, by consent, upon the land of another, partakes so much of the nature of realty, that the builder can not exempt it as personal property. Lawson v. S. T. Barlow Co., 21 Ky. L. R., 308, 309 (1899).]

[The road-bed and rails of a street-railway company are not personal property. Hart v. Benton-Bellefontaine R'y Co., 7 Mo. App., 446 (1879). The poles, wires, rails and rolling-stock of an electric railway upon a city street, are not subject to execution. Kirkpatrick v. Cornwall Street R'y

execution was jointly against both the owner of the land and the owner of the thing annexed thereto.[3]

The rule applies, however, only to those cases where the tenant or other person who has made annexations to the land of another, has a power of removal coupled with an interest; and hence it was observed by Lord Holt in Poole's Case, hereinbefore cited, that the case of a sheriff's taking the tenant's fixtures in execution, or the removal thereof by the tenant himself, was not like the case of tenant for years without impeachment of waste; for in that case the sheriff could not cut down and sell, though the tenant might, and the reason was *because in that case the tenant had only a bare power [*359] without an interest, while in the other cases mentioned he had an interest as well as a power.[4]

With reference to fixtures which are the property of the landlord, but are demised to a tenant with the premises to which they are annexed, the sheriff, although he can not sell the articles as chattels separately from the freehold, may yet levy upon and convey the tenant's interest in such fixtures whatsoever its nature.[5] But where a tenant wrongfully severs fixtures demised to him with the land to which they are annexed, such fixtures become by the severance the absolute property of the landlord, and the tenant has no right to their use during the remainder of the term; and hence they can not after such severance, be seized and sold on a *fi. fa.* against the tenant.[6] Where a sheriff has levied an execution upon a lease and fixtures attached to the premises thereby demised, and is authorized to sell the fixtures separately to satisfy the writ, it is his duty so to do, in case he can not sell them together with the

Co., 2 Ont. Law, 113 (App., 1901). But see Readfield Telephone Co. v. Cyr, 95 Me., 287 (1901), as to telephone poles erected in a public street under a revocable license, and the location of which was subject to change.]

[3] State v. Bonham (*supra*).

[4] See, also, Minshall v. Lloyd, 2 M. & W., 450, 460 (1837), per Alderson, B.

[5] See Went. Off. Ex., 151; Gordon v. Harper, 7 Term, 11, 12 (1796). See *ante*, ch. 1, p. 49.

[6] Farrant v. Thompson, 5 B. & Ald., 826 (1822); s. c., 2 D. & R., 1. See *ante*, Severance, p, *49.

lease to one purchaser;[7] and if, conceiving that the sale of the lease by his broker is fraudulent, he refuses to assign the lease, and returns that the property remains on his hands for want of buyers, he is liable in an action for a false return for the value of the fixtures which ought to have been sold separately; although had he applied to the court for time to make his return on account of the special and unforeseen circumstances of the case, the time therefor would probably have been enlarged.[8]

[7] In the case of a dwelling-house erected by a tenant and forming a part of the leasehold estate, not being naturally divisible from the lot, it is irregular for the officer to levy on the house without also levying on the lease; and unexplained such a levy will be presumed to be authorized. Conklin v. Foster, 57 Ill., 104 (1870). [See Dean v. Pyncheon, 3 Pinney, 17, 25 (Wis., 1850).]

[It is the duty of the sheriff to levy upon both the leasehold and machinery, and sell both together, in precisely the condition the lessee has placed it; otherwise valuable machinery would be unnecessarily impaired by severance, and so would the leasehold. It is immaterial whether the fixtures be real estate or chattels. Steers v. Daniel, 4 Fed., 587, 597 (U. S. C. C., Tenn., 1880).]

[Flouring-mill machinery, which is so annexed to the realty as to be a part of it, passes under an execution sale of all the tenant's right, title and interest in and to the land, although the tenant had, by agreement, a right to remove it. McNally v. Connolly, 70 Cal., 3 (1886).]

[Where a sheriff levies upon a lot and sells the same as real estate, the judgment being against the lessees of the lot, the purchaser acquires no right to machinery thereon which is not so attached as to be a part of the real estate; and as to such as is real estate, demand for delivery or possession must be made before the defendant's detention becomes wrongful. McNally v. Connolly, 9 Pac., 169 (Cal., 1885).]

[8] Barnard v. Leigh, 1 Stark., 43 (1815).

CHAPTER XI. [*360]

OF THE EXEMPTION OF FIXTURES, ETC., FROM DISTRESS.

The rule of law is well settled that things adhering to the freehold are not subject to be taken under a distress; and this rule applies equally to all fixtures, whether removable or irremovable, whether actually or only constructively annexed, and whether erected for the purposes of trade or for other purposes.[1]

Chief Baron Gilbert[2] thus explains the reasons for this exemption: "A distress was anciently no more than a pledge in the hands of the lord, to compel the tenant to pay the service, or perform the duty for which it was taken; and, therefore, at common law it could not be sold, but like all other pawns or pledges, was to be restored to the owner when the service or duty was performed. The nature of contracting by pawns or pledges

[1] See generally Clarke v. Holford, 2 C. & K., 540 (1848); McGregor v. High, 21 L. T. (N. S.), 803 (1870); Gorton v. Falkner, 4 Term, 565 (1792); Moore v. Drinkwater, 1 Fost. & Fin., 134 (1858); Niblett v. Smith, 4 Term, 504 (1792); 1 Roll. Abr., Dist. H, 45; Com. Dig., Dist. C; Year Books, 20 Hen. VII., 13 b (1504); 21 Hen. VII., 26 b (1505), tables dormant; Co. Lit., 47 b; Vausse v. Russel, 2 McCord, 329 (1823), a house. [Gray v. McLennan, 3 Man., 337, 346 (1886); see, also, First Nat. Bank v. Adam, 138 Ill., 483 (1891).]

Charters concerning land are not subject to be distrained. See Bro. Abr., Distress, 29; Replevin, 34; Brownlow, 168; Hellawell v. Eastwood, 6 Exch., 311 (1851). [See, *ante*, p. *230.]

As to deer in a park, see Davies v. Powell, Willes, 46 (1737); s. c., 7 Mod., 249; Cooke, C. P., 221; Com. Dig., Distress, C.

Where a broker under a warrant from a landlord authorizing him to distrain the goods and chattels of the tenant for rent, seized a fixture which was afterwards sold and the proceeds paid to the landlord. *Held*, that the receipt of the proceeds did not make the landlord a trespasser, it not being shown that he was aware of the illegal seizure. Freeman v. Rosher, 18 L. J. (Q. B.), 340 (1849).

[2] Gilb. Dist., pp. 31, 38; Turner v. Cameron, L. R., 5 Q. B., 306, 312 (1870).

[*361] is, that upon payment of the money for *security whereof they were given, the pawn or pledge ought to be restored to the owner in the same plight and condition it was delivered." * * * * * * "Whatever is part of the freehold cannot be distrained; for what is part of the freehold cannot be severed from it without detriment to the thing itself in the removal;[3] consequently, that cannot be a pledge which cannot be restored *in statu quo* to the owner. Besides what is fixed to the freehold is part of the thing demised; and the nature of the distress is not to resume part of the thing itself for the rent, but only the *inducta et illata* upon the soil or house."[4]

The rule at the common law also extends to and exempts from the levy of a distress even *fructus industriales,* such as growing corn, etc.[5] But as between landlord and tenant the rule in this respect has been changed by the Statute 11 Geo. II, c. 19, sec. 8, which authorized the levy of distress for arrears of rent upon all sorts of corn and grass, hops, roots, fruits, pulse, or other product whatsoever which shall be growing on any part of the demised estate. It is, however, held that the word "product" in said act does not extend to trees and shrubs growing in a nurseryman's ground, but is confined to products of a similar nature with those specified in that section to all which the process of becoming ripe, of being cut, gathered, made and laid up when ripe, is incidental.[6]

[3] See Pitt v. Shew, 4 B. & Ald., 207 (1821), per Abbot, C. J.; Simpson v. Hartopp, Willes, 515 (1744), per Willes, C. J.: "Things annexed to the freehold as furnaces, mill-stones, chimney-pieces and the like, cannot be distrained, because they cannot be taken away without doing damage to the freehold, which the law will not allow."

[Articles are not distrainable if not restorable in the plight in which they were before, although removable without injury to the freehold. Howell v. Listonville Rink Co., 13 Ont., 476, 492 (1886).]

[4] See Hellawell v. Eastwood, referred to, *post* in this chapter.

[5] Pitt v. Shew, 4 B. & Ald., 208 (1821); 1 Roll. Abr., 666; 2 Mod., 61; 5 Ed. 2, pl. 135; 18 Ed. 3, 4; 2 Inst., 82. [See, *ante,* p. *264.]

[6] Clark v. Gaskarth, 8 Taunt., 431 (1818); Clark v. Calvert, Id., 742 (1819).

As to the distress of an away-going crop left in accordance with custom in the barns of the farm, such distress being made more than six months after the determination of the lease, see Beavan v. Delahay, 1 H. Bl., 5 (1788); Lewis v. Harris, Id., note (1778).

As already remarked, things only constructively annexed to the freehold are exempt from being taken under a distress. Thus, the doors, windows, etc., of a house, are not distrainable, *though hung upon hooks and removable.[7] And in [*362] Wystow's Case of Gray's Inn,[8] it was held that a mill-stone though severed from the mill by being raised to be picked, is, notwithstanding, still parcel of the mill, and so cannot be distrained. But a mill-stone, if it be not part of the mill;[9] or if a man has two mill-stones, only one of which is in use and the other of which lies by, not used, is said to be distrainable.[10] It may, however, be stated as a general principle that fixtures disannexed for a temporary purpose only, as for the purpose of making repairs, do not become chattels, and hence are not subject to be taken under a distress. But although the fixtures of a tenant may not be distrained upon while annexed to the freehold, or while temporarily severed for repairs, yet when disannexed by the tenant or his agent, not temporarily for repairs, but permanently for the purpose of being sold, they become chattels and liable to distress.[11]

[7] Said in Wystow's Case (*infra*).

[8] 14 Hen. 8, fo. 25 b, pl. 6 (1522), translated in a note to Place v. Fagg, 4 M. & R., 280; Finch, book 2, p. 135. See, also, Bro. Abr., Dist., pl. 23; 11 Co., 50; Gilb. Dist., 49; 6 Mod., 187.

[9] Finch, book 2, p. 135.

[10] Willes, 516, citing 14 H. 8 (*supra*). There seems to have been among the more early authorities some doubt as to whether a smith's anvil would be exempt from distress. In Wystow's Case (*supra*) the reporter adds a *quaere* "of a smith's anvil, for it seems all one, if it be that which he uses in his trade (*ceo sur que il occupie*), notwithstanding it may be off the stock." See, also, Bro. Abr., Distress, pl. 23; Ferard Fixt., 317.

In Gorton v. Falkner, 4 Term, 567 (1792), Lord Kenyon, C. J., said that the anvil in the smith's shop, and the mill-stone were privileged, because they were affixed to the freehold, and that a temporary removal of the one or the other, for the purpose stated in the argument, was not sufficient to destroy that privilege. See, also, Bradby on Distress, 214; Reynolds v. Shuler, 5 Cow., 323, 328 (1826), per Sutherland, J.; Com. Dig., Distress, C.

In Jollie & Broad's Case, 2 Rolle, 201, 202 (1620), the exemption of a mill-stone or an anvil of a smith is put upon the ground that being tools, to distrain them would be a hindrance to his trade.

[11] Reynolds v. Shuler, 5 Cow., 323 (1826). The articles in question in this case were the stills, steam-tub, cooler and worm used in carrying on the distilling business.

As to what particular fixtures have been decided not to be subject to distress, the cases are not numerous. Besides the instances already mentioned, furnaces, cauldrons or the like, [*363] *fixed to the freehold, cannot be distrained.[12] Neither can tenant's fixtures, such as kitchen ranges, register stoves, coppers, and grates, annexed to the freehold in the ordinary manner, and which the tenant might sever and remove during his term.[13] In Turner v. Cameron [14] the facts were as follows: Three railways were connected with a coal mine, one being within the mine, one within the yard used for the purposes of the colliery, and a third extending through the yard and along the waste of a manor of the defendant and forming a junction with a public railway. These railways were laid down by the lessees of the colliery and were constructed as follows: The ground was brought to a dry and uniform surface by spreading ballast thereon. Sleepers were then laid thereon and the rails laid on and secured to the sleepers by dog-nails, after which ballast was packed under and about the sleepers to keep them dry and in position. In order to remove the rails, the nails were wrenched out or the heads knocked aside with a bar or pick; and to remove the sleepers the ballast about them was partly removed or loosened with a pick and the sleepers then pried out, leaving holes in the ballast. The rent being in arrear the lessor distrained, among other things, the three railways, removing them as above stated; and it was held by the Court of Queen's Bench that the railways were fixtures and not subject to distress.

In the case of Duck v. Braddyll,[15] in referring to the reason

[12] Co. Lit., 47 b; Com. Dig., Distress, C.

[13] Darby v. Harris, 1 Q. B., 895 (1841). See, also, Dalton v. Whittem, 3 Q. B., 961 (1842); Twigg v. Potts, 3 Tyrwh., 969 (1834).

Some of these articles would now doubtless be considered mere furniture and not fixtures in any sense of the word. The case does not state the manner of the annexation. See *ante*, p. *298.

[A temporary floor in a roller skating rink can not be distrained. Howell v. Listonville Rink Co., 13 Ont., 476, 492 (1886).]

[14] L. R., 5 Q. B., 306 (1870); s. c., 39 L. J., Q. B., 125; 9 B. & B., 931; 22 L. T. (N. S.), 525; 18 W. R., 544; 24 L. T. (N. S.), 500, on a question as to costs.

[15] McClel., 217, 231 (1824); s. c., 13 Price, 455.

of the rule already stated, that at common law, a distress being no more than a pledge, nothing can be the subject of it which can not be restored in the same condition in which it was taken away, it was insisted that certain machines erected *in [*364] a factory by a tenant and fastened to the floor by bolts and screws only, were distrainable, because they might be removed and replaced by means of the bolts and screws without sustaining any injury whatever. On the other hand it was insisted, that the right to distrain did not extend to such machines, because it was a general rule that chattels fixed to the freehold could not be distrained; and it was not to be confined to those cases only where the property could not be restored *in statu quo;* and the instance of the mill-stone was cited in support of this position. The point was not, however, passed upon by the court in that case. In Darby v. Harris, already referred to, the strict rule, as laid down by the early authorities seems to have been followed, though the true ground of the rule on this subject was declared to be that the fixtures cannot be restored in their original plight. The subject again came under consideration in the case of Hellawell v. Eastwood,[16] where it was held, that cotton-spinning-machines called "mules," set up by a tenant on the demised premises, some of which were fixed by means of screws to the wooden floor, and some by screws which had been sunk into holes in the stone flooring, and secured by molten lead poured into them, the object of the annexation being not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels, were not a part of the freehold and were distrainable for rent. In this case Parke, B., after referring to the observations of Lord Chief Baron Gilbert, already quoted, said: "We have, therefore, to decide whether these machines fall within either of those categories, for otherwise they are not protected. They do not fall within the latter; for upon being taken to the pound, they might be brought back without damage to themselves. They are not of a perishable nature, and would not suffer by a careful removal. If it were necessary to take some to pieces, in order to remove them, that circumstance would make no difference; for that might occur with chattels with respect to which there is no

[16] 6 Exch., 295 (1851); s. c., 20 L. J. Exch., 154.

question, as for instance, post-beds; they could not be carried [*365] *to the pound without being first taken to pieces; and the distrainee would have no reason to complain that they were restored to him in the disjointed state at the pound, where he must attend to receive them. It would save him the trouble of taking the bedsteads to pieces again, in order to replace them, if they had been restored entire. Nor does it make any difference, that the distrainee would be obliged to incur the expense of refixing the machinery. Precisely the same objections might be made to the distress of any article which it required expense to carry back from the pound and to restore to its former position. The distrainee, at common law, must be at the trouble and expense of taking back his goods from the pound. This practical inconvenience is now obviated by the power of impounding on the premises.

"The only question, therefore, is, whether the machines when fixed were parcel of the freehold; and this is a question of fact, depending on the circumstances of each case, and principally on two considerations: first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed, *integre, salve, et commode,* or not, without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the Civil Law, *perpetui usus causa,* or in that of the Year Book, *pur un profit del, enheritance,*[17] or merely for a temporary purpose, or the more complete enjoyment and use of it *as a chattel.*" Applying the law thus stated the conclusion was arrived at that the articles in question never ceased to have the character of movable chattels, and were therefore liable to distress.

This case, it will be observed, recognizes to its full extent the rule of the common law that things fixed to the freehold, and which have become a part of it, cannot be distrained; and also places the rule upon the two grounds assigned by Chief Baron Gilbert. The rule of law laid down in the case as to the tests by which to determine whether the machines in question were [*366] fixtures, has with some qualifications been approved *in

[17] 20 Hen. VII., 13.

subsequent cases, and does not, when taken with such qualifications, differ essentially from that laid down in a previous chapter.[18] But the correctness of the application of the law to the

[18] In Holland v. Hodgson, L. R., 7 C. P., 328, 337 (1872), Blackburn, J., in referring to this case, said: "The words 'merely for a temporary purpose' must be understood as applying to such a case as we have supposed, of the anchor dropped for the temporary purpose of mooring the ship, or the instance immediately afterwards given by Parke, B., of the carpet tacked to the floor for the purpose of keeping it stretched whilst it was there used, and not to a case such as that of a tenant who, for example, affixes a shop-counter for the purpose (in one sense temporary) of more effectually enjoying the shop whilst he continues to sell his wares there. Subject to this observation we think that the passage in the judgment in Hellawell v. Eastwood does state the true principles, though it may be questioned if they were in that case correctly applied to the facts." See, also, the observations in this case as to the expression relating to the improvement of the inheritance and more convenient use of the articles as chattels; also Turner v. Cameron (*infra*).

The *dictum* in said case of Hellawell v. Eastwood, that such articles would not pass by a conveyance or demise of the mill may be considered as overruled. See Holland v. Hodgson (*supra*), and the cases there cited. See the case commented upon generally in Longbottom v. Berry, L. R., 5 Q. B., 123, 137 (1869); Mather v. Fraser, 2 Kay & John., 536, 549 (1856); Climie v. Wood, L. R., 3 Exch., 257, 261 (1868); s. c., 4 Id., 328; Regina v. Lee, L. R., 1 Q. B., 244, 254 (1866); Barnett v. Lucas, 5 Ir. Com. Law, 145 (1870); Turner v. Cameron, L. R., 5 Q. B., 306, 312, 313 (1870).

[A spinning-mule, eleven by ninety, having over four hundred spindles, and screwed to the floor of a mill, is subject to distress. "Fixtures slightly attached, which the tenant may remove at his pleasure during the term, and which may be removed without destroying their character or injuring them, may be distrained. They can be restored in the same plight." Furbush v. Chappell, 105 Pa. St., 187, 190 (1884).]

[Certain machines were distrained and taken from an ironworks. One was attached overhead; some were fastened by bolts through the floor, the flooring being taken up, and the bolts holding the machines in place were let through cross sleepers of wood sunk in the ground below; others were similarly fastened, screws being used instead of bolts. All the machines had belts which ran through pulleys connected with shafting, which was fastened to the framework overhead. *Held*, that they were removable, and were removed without injury either to themselves or to the fabric of the building, and that the object of the annexation was to keep them steady; and that they were not fixtures. Cartwright v. Widemann, 9 Hawaii, 685, 689 (1892).]

[A planing machine resting by its own weight and connected only by belting is a chattel and distrainable for unpaid taxes. Hope v. Cumming, 10 Up. Can. C. P., 118, 121.]

facts of the case seems open to considerable doubt,[19] though it has been approved in a subsequent case.[20]

Whatever may be thought as to the correctness of the decision in the case above mentioned, the common law privilege of exemption of fixtures from distress may probably be waived by the contract of the parties in interest; and it has been held that machinery, let with a manufactory (the property in such machinery being transferred to the tenant in consideration of money), with a power to distrain on such machinery reserved by the lease,—is distrainable. And if taken and sold on execution by the sheriff, he must pay to the landlord out of the proceeds the unsatisfied arrears of rent due for one year or less according to the Statute 8 Anne., ch. 14.[21]

[19] See Holland v. Hodgson, *supra,* in note.

[20] See Turner v. Cameron, L. R., 5 Q. B., 306, 312, 313 (1870).

[21] Duck v. Braddyll, McClel., 217 (1824); s. c., 13 Price, 455.

OF RIGHTS AND LIABILITIES RESPECTING LAND AS INCREASED IN VALUE BY THE ANNEXATION OF PERSONAL CHATTELS.

I. Taxation in the United States.

The subject of taxation, as relating to fixtures, depends so much upon the character of the statutes under which the power is exercised, which vary according to the policy of the different States, that little more can be done in considering the subject than to call attention in the notes to the few cases wherein the subject has been discussed.

With respect to the subject-matter of taxation as being realty or personalty, the terms of the statutes generally have a controlling influence;[1] but where the subject is not controlled by statutory definitions of the terms "realty" and "personalty," or other express terms, no reason is perceived why the ordinary rules for determining the question already considered, should not be applicable to the solution of the question.[2]

[1] See Cooley on Taxation, 275.

[2] Where the provisions of the charter under which the right of way ground of a railroad corporation was taxable, enacted that "an annual tax for State purposes shall be assessed by the Auditor upon all the property and assets of every name, kind and description belonging to said corporation," it was *held*, that grain ware-houses built by private individuals on said land for their own benefit, and confessedly belonging to and removable by them as personal property, did not come within the terms of such statute as property "belonging" to the corporation; and hence did not come within the exemption from taxation of the company's roadway upon which they were situated, and hence were taxable as the personal property of the persons to whom they belonged. Gilkerson v. Brown, 61 Ill., 486 (1871).

[Elevators, owned by third parties, upon the right of way of a railroad company, are, under § 1510, G. S., 1894, personal property for the purpose of taxation. State v. Red River Co., 69 Minn., 131, 133 (1897), overruling

Minneapolis & N. Elevator Co. v. Clay County, 60 Minn., 522, 523 (1895).]

[An exemption of the right of way of a railroad company covers the land and whatever is erected upon it necessary for the construction and operation of a railroad. New Mexico v. United States Trust Co., 172 U. S., 171 (1898); 174 U. S., 545, 547 (1899); Northern Pac. R. R. v. Carland, 5 Mont., 146 (1884); U. S. Trust Co. v. Territory, 8 N. Mex., 673, 693 (1896); *contra,* Territory v. Delinquent Tax List, 3 Ariz., 117, 121 (1889); Atlantic & P. R. R. Co. v. Lesueur, 2 Ariz., 428 (1888).]

[In Commissioners of Chase County v. Shipman, 14 Kan., 532, 537 (1875), it was held that a grist mill and saw mill erected upon land of the United States which was occupied as a homestead, were exempt from taxation if the land was exempt; and that calling them personal property did not make them so; but in Crocker v. Donovan, 1 Okla., 165, 178 (1892), it was held that improvements made by a homestead entryman were taxable as personal property.]

[An engine and boiler firmly affixed to the rock by bolts leaded down, and built in to a brick foundation, are exempt as part of a mining claim, although exemptions from taxation are strictly construed; but a pipe line conducting water to the mine is not exempt. Mammoth Mining Co. v. Juab County, 10 Utah, 232, 236 (1894). Likewise, a building erected on the surface, containing the machinery for crushing ore, is exempt, where the land was leased for mining, and "mines" are, by statute, exempt. Mayor of Eaglehawk v. Lady Barkly Co., 7 Aust. Law T., 72 (Vict., 1885).]

[Where the charter of a cemetery company exempts its land from taxation, such exemption extends to gate-houses and all permanent improvements as a part of the realty; and a statute requiring assessors to estimate the value of land, and separately value the improvements thereon, does not convert the improvements into personalty, but only points out the mode of ascertaining the aggregate value. Appeal Tax Ct. v. Balt. Co., 50 Md., 432 (1878); see Andrews v. Auditor, 28 Gratt., 115 (Va., 1877).]

[A building erected by a lessee upon land which is exempt from taxation, is not exempt. San Francisco v. McGinn, 67 Cal., 110 (1885); Russell v. New Haven, 51 Conn., 259, 261 (1883), practically overruling Osborne v. Humphrey, 7 Conn., 335, 340 (1829); Parker v. Redfield, 10 Conn., 490 (1835); Burbank v. Board of Assessors, 52 La. Ann., 1506 (1900); New Orleans v. Russ, 27 La. Ann., 413 (1875); Lee v. New Orleans, 28 La. Ann., 426, 427 (1876); Philadelphia, W. & B. R. R. Co. v. Appeal Tax Ct., 50 Md., 397, 413 (1878); State v. Mission Free School, 162 Mo., 332 (1901); People v. Board of Assessors, 93 N. Y., 308 (1883). In these cases the building was, during the term at least, the property of the lessee. If the building had been the property of the lessor, it is indicated that it would have been exempt as part of the land.]

[A bridge, although resting upon a public highway or over a navigable river, is taxable as real estate. Alexandria Canal R. R. & Bridge Co. v. District of Columbia, 12 D. C., 217, 227 (1881); Kittery v. Portsmouth Bridge, 78 Me., 93, 97 (1886); Hudson Bridge Co. v. Patterson, 74 N. Y.,

365, 370 (1878). A bridge resting upon stone piers belonging to the county, is not, while in the possession of a lessee, exempt. Luttrell v. Knox County, 89 Tenn., 253 (1890).]

[A pier built upon city lands is properly taxed as real estate. Smith v. Mayor, 68 N. Y., 552 (1877); so, of a wharf upon a public street. People v. Commissioners of Taxes, 17 Supr. Ct. (10 Hun), 207 (N. Y., 1877). But in Percival v. Thurston County, 14 Wash., 586, a wharf on state land was, under the statute, considered personal property.]

[A boom, consisting of permanent piers across a river, and logs fastened to the piers and shores by iron chains, is taxable as real estate. Hall v. Benton, 69 Me., 346, 347 (1879).]

[An exemption of workshops includes all machinery and implements necessary to their management. Richmond & Danville R. R. Co. v. Alamance, 84 N. C., 504 (1881). Spinning machinery, while attached to a building, is exempt as an improvement on land, although the party attaching it has the right to remove it. *Ex parte* Makepeace, 31 N. C., 91 (1848).]

[Conversely, the exemption of a building impliedly carries with it such grounds as may be reasonably necessary for its use. Gerke v. Purcell, 25 Ohio St., 229, 248 (1874); but see Lefevre v. Detroit, 2 Mich., 586 (1853), that an exemption of a house of public worship does not extend to the ground upon which it stands.]

[Fruit trees are not exempt from taxation as "growing crops." Cottle v. Spitzer, 65 Cal., 456 (1884); nor is alfalfa; neither is it taxable as an "improvement," nor can it be taxed as personal property until severed. Miller v. County of Kern, 137 Cal., 516 (1902).]

Gas-pipes belonging to a gas company, laid in the streets of a city by permission of the corporate authorities, do not become the property of the city or a part of the realty, but remain the personal property of the company, and are taxable as against the company, as a part of a "manufacturing establishment." Memphis Gas-light Co. v. The State, 6 Cold., 310 (1869). See, however, Providence Gas Co. v. Thurber, 2 R. I., 15 (1851), where the gas-pipes were considered fixtures and taxable as real estate. See, also, Commonwealth v. Lowell Gas-light Co., 12 Allen, 75 (1866), where the term "machinery" was considered to include gas-pipes laid down in the streets, and the gas-meters.

[Gas-pipes, water-mains, and hydrants in the public streets, are realty for the purpose of taxation. Colorado Fuel Co. v. Pueblo Water Co., 11 Colo. App., 352, 357 (1898); Capital City Gas Co. v. Charter Oak Ins. Co., 51 Iowa, 31, 35 (1879); *Re* Des Moines Water Co., 48 Iowa, 324, 331 (1878); Paris v. Norway Water Co., 85 Me., 330, 335 (1893); People v. DeWitt, 59 App. Div., 493, 494 (1901), aff'd 167 N. Y., 575, 576 (1901); People v. Martin, 55 Supr. Ct. (48 Hun), 193, 194 (N. Y., 1888); Styles v. Newport, 56 Atl., 662, 667 (Vt., 1904); Willard v. Pike, 59 Vt., 202, 223 (1886); Consumers Gas Co. v. Toronto, 27 Can., 453 (1897), aff'g 23 Ont. App., 551 (1896), and 26 Ont., 722 (1895); Sherbrooke Gas Co. v. Sherbrooke, 15 Leg. News (Montreal), 22, 30 (Circ. Ct., Que., 1891); *Re*

Hamilton Gas Co., 32 Can. Law J., 366 (Ass't Ct., Ont., 1895); see, also, Monroe Water Co. v. Frenchtown, 98 Mich., 431 (1894). This matter is very frequently statutory. Herkimer Light Co. v. Johnson, 37 App. Div., 257 (N. Y., 1899). The following cases hold that water-pipes, hydrants, gas-mains, and electric wires are assessable as personal property. Shelbyville Water Co. v. People, 140 Ill., 545 (1892); People v. Board of Assessors, 39 N. Y., 81, 87 (1868); Saint Croix Water Co. v. Milltown, 31 N. Brunsw., 452 (1892); *Re* St. Catharines Light Co., 30 Can. Law J., 205 (Co. Ct., Ont., 1894). These, also, are made so by legislation, including buildings. State v. Wharton, 115 Wis., 457, 462 (1902).]

[Gas-meters placed on the premises of consumers, are personalty. *Re* Hamilton Gas Co., 32 Can. Law J., 366 (Ass't Ct., Ont., 1895); but a reservoir becomes a part of the land. Saint Croix Water Co. v. Milltown, 31 N. Brunsw., 452 (1892).]

[An underground pipe line for conveying crude petroleum from one state to another, is real estate, although the surface is owned and cultivated by others. Tide Water Pipe Line Co. v. Berry, 53 N. J. Law, 212 (1890); State v. Berry, 52 N. J. Law, 308 (1890).]

[Where mains, standpipes, and hydrants are considered realty, the question arises whether they are to be assessed as a part of the main works, or should they be assessed where situated. In Iowa it is held that they are a part of the main works, although the latter are located upon leased ground, the lessees having the right to remove all of their property at the end of the term, the term being long and the buildings substantial. Oskaloosa Water Co. v. Board of Equalization, 84 Iowa, 407 (1892); Capital City Gas Co. v. Charter Oak Ins. Co., 51 Iowa, 31, 35 (1879); *Re* Des Moines Water Co., 48 Iowa, 324, 331 (1878). But the following cases hold that such property should be taxed where situated. Dover v. Maine Water Co., 90 Me., 180, 182 (1897); Calgary v. Calgary Gas Co., 2 N. W. Ter., 86 (1897), aff'g, in part, *Re* Calgary Gas Co., 16 Can. Law T., Occ. N., 235 (N. W. Ter., 1896); *Re* Calgary Waterworks Co., 31 Can. Law J., 310 (N. W. Ter., 1895), where the decision was influenced by the provisions of an ordinance. See, also, Calgary v. Calgary Gas Co., 2 N. W. Ter., 165 (1898).]

[Where pipes have been taxed as personal property, and the tax upon the lot upon which is situated the gas-works, has been paid, the assessment upon the pipes can not afterwards be treated as an assessment upon the lot, and the lot sold for non-payment of taxes. Capital City Gas Co. v. Charter Oak Ins. Co., 51 Iowa, 31, 35 (1879).]

[Pipes, lamp-posts, and meters are not exempt from taxation as "machinery," as they manufacture nothing. Covington Gas-Light Co. v. Covington, 84 Ky., 94, 98 (1886); Dudley v. Jamaica Pond Corp., 100 Mass., 183, 184 (1868); Consolidated Co. v. Baltimore, 62 Md., 588 (1884); *Re* Calgary Waterworks Co., 31 Can. Law J., 310 (N. W. Ter., 1895). But in *Re* Consumers' Gas Co., 30 Can. Law J., 157 (Co. Ct., Ont., 1893), it was held that gas mains in the public highways are assessable as "machinery," forming a part of the plant, or as realty, and are not exempt because the

highways are. The tanks and machinery for making gas are exempt as "machinery in manufactories." Covington Gas-Light Co. v. Covington, 84 Ky., 94 (1886).]

[A portable saw-mill, which is moved from place to place, is not taxable as "machinery employed in any branch of manufactures" and "situated or employed" in its temporary location. Ingram v. Cowles, 150 Mass., 155 (1889).]

T. owned a steam saw and grist-mill situated on and attached to the land of B. After assessment to T. for taxes, T. sold the mill to W. On a bill filed by W. to enjoin the collection of the tax on the ground that the mill was a fixture and as such its value was included in the assessment of the land, *held,* that the mill was personalty; and that, if assessed with the land and not as personalty, and no taxes were due, the plaintiff's remedy was in law and not in equity. Witherspoon v. Nickels, 27 Ark., 332 (1871). See, also, Patterson v. Delaware Co. (*infra*); People v. Cassity, 46 N. Y., 46, 49 (1871).

[The following cases hold that buildings and other structures erected by a lessee, or by a licensee having the right of removal, are not taxable as realty. McGee v. Salem, 149 Mass., 238 (1889); John T. Dyer Company's App., 21 Pa. Co., 442 (1898); East Tenn., V. & G. R'y Co. v. Morristown, 35 S. W., 771, 774 (Tenn. Ch., 1895), where the term was ninety-nine years; Clove Spring Iron Works v. Cone, 56 Vt., 603, 608 (1884); Carter v. Tyler County, 45 W. Va., 806, 808 (1899); Wilson v. Youst, 43 W. Va., 826, 834 (1897). The last two cases related to machinery of oil-wells, which is regulated by statute.]

[The following cases hold that buildings, machinery, and fixtures, owned by a lessee or by a licensee, are taxable as realty. Union Compress Co. v. State, 64 Ark., 136 (1897); Russell v. New Haven, 51 Conn., 259, 262 (1883); Foxcroft v. Straw, 86 Me., 76 (1893); Flax Pond Water Co. v. Lynn, 147 Mass., 31, 33 (1888); Milligan v. Drury, 130 Mass., 428, 430 (1881), a building resting upon timbers laid upon the top of the ground expressly for the purpose of removal; People v. Commissioners of Taxes, 80 N. Y., 573, 575 (1880); *Ex parte* Makepeace, 31 N. C., 91 (1848); West Virginia, C. & P. R. R. Co. v. McIntire, 44 W. Va., 210, 212 (1897), governed by the Code.]

[A statute providing that grain elevators upon railroad lines shall be taxed as personal property, refers to structures not owned by the railroad company. Chicago, M. & St. P. R'y Co. v. County of Houston, 38 Minn., 531 (1888).]

[Greenhouses built by a tenant are "erections and structural improvements" in the sense of the Valuation Act, 1854. Gilchrist v. Lanarkshire Assessor (1898), 35 Scot. Law Rep., 663.]

In People v. Cassity, 46 N. Y., 46 (1871), the term "land" used in the statute, was considered to include such an interest in real estate, though less than a fee, as will protect the erection or affixing thereon, and the possession of buildings and fixtures, and that such buildings and fixtures were liable to assessment as the lands of whomsoever has that interest in

the real estate and owns and possesses the fixtures. The property in question was the track of a street railway company laid down in a highway where the company had not the fee, but the written consent of the owners of the adjoining lands, giving the exclusive right to use the land occupied by the company for the passage of their teams and vehicles during the chartered existence of the company. The statute in question (1 R. S., 360, §§ 1, 2) provided that "all lands * * * within this State whether owned by individuals or corporations, shall be liable to taxation * * *." "The term 'land' * * * shall be construed to include the land itself, and all buildings and all other articles erected upon or affixed to the same * * *; and the terms 'real estate' and 'real property' * * * shall be construed as having the same meaning as the term 'land' thus defined." The fixtures in this case would seem to have been properly considered as realty on the same principle that tenant's fixtures are so considered during annexation. See, also, New Haven v. Fair Haven, 38 Conn., 422 (1871), and the cases cited in the next section. [See Hughes v. Vail, 57 Vt., 41, 44 (1885); Eureka Min. Co. v. Ferry County, 28 Wash., 250, 258 (1902).]

[The rails, poles, wires, bridges, power-house, and cars of an electric street railway are taxable as real estate. Newark & Hackensack Co. v. North Arlington, 65 N. J. Law, 150, 151 (1900); New York Guaranty Co. v. Tacoma R'y Co., 93 Fed., 51 (U. S. C. C. A., Wash., 1899); *Re* London R'y Co., 27 Ont. App., 83 (1900); *Re* Toronto R'y Co., 25 Ont. App., 135 (1898), reversing 33 Can. Law J., 75 (Ass't Ct., Ont., 1896); *Re* Bell Telephone Co., 37 Can. Law J., 851 (Ass't Ct., Ont., 1901). So, as to the tracks, stations, stairways, superstructures, viaducts, piers, foundations, tunnels, substructures and masonry of a railroad above or under a city street. People v. Commissioners of Taxes, 101 N. Y., 322, 325 (1886), reversing 30 Supr. Ct. (23 Hun), 687 (1881); People v. Commissioners of Taxes, 82 N. Y., 459, 463 (1880), aff'g 26 Supr. Ct. (19 Hun), 460, 461 (1879). So, as to the wires, poles, switchboards, instruments and attachments of a telegraph or telephone line located upon the public land. Western Union T. Co. v. State, 56 Tenn., 509 (1876); Bell Telephone Co. v. Ascot, 16 Que., C. S., 436, 443 (1899); *Re* New Westminster Telephone Co., 32 Can. Law J., 490 (Br. Col., 1896); Bell Telephone Co. v. Winchester, 31 Can. Law J., 667, 669 (1895); *Re* Canadian Pac. R. Tel. Co., 34 Can. Law J., 789 (Ass't Ct., Ont., 1898).]

[*Contra.* The track, poles and wires of a street railway are not assessable as realty. State v. Anderson, 90 Wis., 550, 567 (1895); Toronto Street R'y Co. v. Fleming, 37 Up. Can., Q. B., 116 (1875), reversing 35 Up. Can., Q. B., 264 (1874).]

[Poles erected upon city streets and private lots under license revocable at any time, the owner of the poles having no easement in the highways, and wires thereon issuing out of a building, are personal property, and not taxable as real property, although they may remain for an indefinite period. Newport Co. v. Assessors, 19 R. I., 632, 638 (1896). A switchboard is not a fixture. *Re* New Westminster Telephone Co., 32 Can. Law J., 490 (Br. Col., 1896).]

[As in the case of mains and pipes, *supra*, the point has arisen whether street railway track, bridges, poles, wire and cars, when treated as realty for the purpose of taxation, should be assessed as a whole, or apportioned to each ward through which the railway runs. The latter view is taken in *Re* London R'y Co., 27 Ont. App., 83 (1900), and *Re* Bell Telephone Co., 37 Can. Law J., 851 (Ass't Ct., Ont., 1901).]

[Another question which has engaged the attention of the courts is whether street railway track is liable to assessment for public improvements. This is very largely dependent upon the wording of the statute authorizing such assessments. In Koons v. Lucas, 52 Iowa, 177, 181 (1879), it was held that a street railway line should not bear any part of the expense, the statute providing that the tax should be levied upon "parcels of land fronting on such highways." See State v. District Court of Ramsey County, 31 Minn., 354 (1884). But in Cicero & Proviso S. R. Co. v. Chicago, 176 Ill., 501 (1898), it was held that street railway track must bear its just proportion of the cost of the construction of a sewer, in the same manner and to the same extent as any real estate, although Chapter 120, Section 15 of the statutes provides that street railway track shall be assessed as personal property for general taxation, as that chapter has no bearing upon special assessments upon contiguous property for local improvements under another chapter. Likewise the right of way, road-bed and depots of a railroad are liable to special assessment. Commissioners of Chatham County v. Seaboard Air Line R'y Co., 133 N. C., 216 (1903). See Northern Ind. R. R. Co. v. Connelly, 10 Ohio St., 159 (1859).]

[The rails, sleepers, bridges, fences, buildings, fixtures, and all structures upon a railroad right of way are real estate for the purpose of taxation. New Mexico v. United States Trust Co., 174 U. S., 545, 551 (1899); State v. Hannibal, &c., R. R. Co., 135 Mo., 618, 646 (1896); Providence & W. R. R. Co. v. Wright, 2 R. I., 459, 462 (1853); likewise, a private railroad track. Mitchell v. Township of Lake, 126 Mich., 367 372 (1901). This is frequently a matter of statutory regulation. Union Trust Co. v. Weber, 96 Ill., 346, 350 (1880); Ohio & Miss. R. R. Co. v. Weber, 96 Ill., 443, 448 (1880); Missouri, K. & T. R'y Co. v. Miami County, 73 Pac., 103, 105 (Kan., 1903).]

[The bridges and other structures of a turnpike company, having an easement over the land, are assessable as real property. *Re* President of Albany & B. Road, 94 App. Div., 509 (N. Y., 1904).]

[Where a statute provides that real property shall be assessed only in the odd numbered years, buildings erected by a landowner during an even numbered year, and which are real property, cannot be taxed as personal property, although it results in such property escaping taxation altogether during that year. Richards v. Wapello County, 48 Iowa, 507, 508 (1878).]

[As a general rule, houses, fixed and stationary machinery, and other structures are a part of the land for the purpose of taxation. Peoria,

D. & E. R'y Co. v. Goar, 118 Ill., 134, 138 (1886); Hecksher v. Sheafer, 1 Cent., 928 (Pa., 1886).]

[Whatever is a part of the realty is taxed as such. Newland v. Baker, 26 Kan., 341, 345 (1881); Tremont Mills v. Lowell, 163 Mass., 283, 286 (1895); see, also, Irvin v. N. O., St. L. & Chi. R. R. Co., 94 Ill., 105, 113 (1879).]

["Property" in a statute relating to special assessments for adjacent improvements, means the land and buildings thereon. Mound City Construction Co. v. Maegurn, 97 Mo. App., 403 (1902).]

[The rule to be applied is to be decided by principles no less rigid than those which would be applied to a question of fixtures arising between vendor and vendee; hence, where the owner of land annexes machinery essential to his business, it is taxable as realty. People v. Waldron, 26 App. Div., 527 (N. Y., 1898).]

[Machinery in water-works is real estate for the purpose of taxation. *Re* Des Moines Water Co., 48 Iowa, 324, 331 (1878); likewise, engines, boiler, dynamos and machinery in a power-house of an electric street-railway. Detroit United R'y v. Board of Commissioners, 98 N. W., 997, 999 (Mich., 1904).]

[The Lands Valuation (Scotland) Act, 1854, sec. 42, provides that "lands and heritages" shall extend to and include all machinery "fixed or attached." *Held,* under that section, that machinery attached by the proprietor of a foundry in order that it may be used permanently, and where the building has been specially adapted to its use, and would require to be altered if removed, is a part of the land, although it can be separated without injury; but machinery not affixed is not part of the land. The law applicable in questions between heir and executor, and not that between landlord and tenant, seems to govern. Steam hammers bolted to logs are a part of the realty, where the logs are let into a specially prepared concrete foundation, although the bolts do not pass into the concrete; but cranes running upon rails are not. Dundee Assessor v. Carmichael, (1902), 39 Scot. Law Rep., 573).]

[Boilers, engines, derricks, tanks, boiler-houses, store-houses and tank-houses erected for temporary use, and moved from time to time as the business of drilling for oil requires, are not taxable as real estate. Mellon v. Allegheny County, 3 Pa. Dist., 422 (1894).]

[Mill machinery is taxable as personal property. Hamilton Mfg. Co. v. Lowell, 69 N. E., 1080 (Mass., 1904); so, as to a dynamo and switch-board under the statute. Newport Co. v. Assessors, 19 R. I., 632, 636 (1896).]

[Machinery, although so attached as to be a part of the realty between grantor and grantee, lessor and lessee, is taxable as personal property at common law. The doctrine of fixtures, as between vendor and vendee, lessor and lessee, mortgagor and mortgagee, though recognized in Maryland as to these parties, has never been imported into the law of taxation. Commissioners of Anne Arundel County v. Baltimore Sugar Co., 58 Atl., 211, 212 (Md., 1904).]

*However, it has been held in Connecticut in the case [*368] of Sprague v. Lisbon,[1] that under a statute providing that "mills" shall be taxable, the machinery therein contained is taxable as a part of the mill whether realty or personalty, and notwithstanding the fact that the owner thereof is a non-resident of *the State. In Pennsylvania, where the criterion of [*369] physical annexation has been abandoned, where a cotton-factory was assessed as "square of ground, factory and machinery," (the whole being assessed as real estate) and a tax levied on the valuation for county purposes, it was held that both under the general terms of the statute, and as a part of a "mill," the machinery was properly assessed as real estate.[2]

[All permanent fixtures are a part of the land at common law; but it is competent for a legislature, unless restricted by the State or Federal Constitution, to declare every species of property personal for the purpose of taxation, and authorize the person purchasing at a tax-sale thereof, to detach and remove trees, crops, or even windows and doors. Where a statute makes it the duty of an assessor to list steam-engines as personal property, it will be presumed that he did not value them in assessing the real estate. Johnson v. Roberts, 102 Ill., 655, 659 (1882).]

[Where the lessees of a "store" covenanted to pay all taxes levied thereon, they are bound to pay the tax upon the land under the store. Hooper v. Farnsworth, 128 Mass., 487, 488 (1880).]

[Where an act in regard to assessing taxes upon the property of a railroad company, names "side tracks" as a distinct property, without other designation or definition, it necessarily implies the land to which it is attached is to be included. "The ties and rails are attached to the land and a severance would destroy the side tracks. Moreover, side tracks are built upon a bed of earth, generally filled up even with the rails. Generally speaking, the land is almost valueless without the track, and the track without the land is only valuable in the worth of the rails and ties." State v. Hannibal, &c., R. R. Co., 135 Mo., 618, 645 (1896).]

[For the purpose of taxation, nursery-stock owned by the land-owner, is a part of the realty. Wilson v. Cass County, 69 Iowa, 147 (1886).]

[1] 30 Conn., 18 (1861). See Farrar v. Stackpole, *ante*, p. *17.

[2] Patterson v. Delaware Co., 70 Pa. St., 381 (1872). The statute referred to (Act of April 29, 1844, § 32), provides that "all real estate, to wit, houses, lots of grounds, ground-rents, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, malt-houses, breweries, vine-yards, fisheries, ferries, wharves, *and all other real estate not exempt by law from taxation*, shall be valued and assessed for all State and county purposes."

[Under Act of 15th of April, 1834, § 4, providing that "manufactories of all descriptions" shall be subject to assessment as real estate, ma-

The subject has also been somewhat considered with reference to the rolling-stock, etc., of railroad corporations. As respects the taxation of corporations, special rules are generally prescribed by statute; but "where railroad property is taxed as other property is, the personalty should be assessed to the company at the place of its business office; that being the legal *situs* of its personalty."[3] As to whether such rolling-stock is realty or personalty, there is much conflict of opinion. The subject has already been somewhat considered in a preceding chapter;[4] and, as respects the taxation of that species of property, in the absence of statutory regulations on the subject either expressly or by fair implication defining its *status*, the better opinion seems to be that it should be taxable as personal property.[5] It is, however, competent for the legislature to fix its *status* either as being realty or personalty.[6]

chinery affixed to the premises by a lessee is taxable as real estate. Luzerne County v. Galland, 3 Luz. Leg. Reg. R., 11 (1884); but machinery used for printing and publishing a newspaper is not a "manufactory"; and if it belongs to a tenant it is not taxable as real estate. Wilkes-Barre Times v. Wilkes-Barre, 10 Pa. Dist., 691 (1901).]

[3] Cooley on Taxation, 273, and cases there cited.

[4] *Ante* p. *34.

[5] See Randall v. Elwell, 52 N. Y., 521 (1873); s. c., 11 Amer. Rep., 747; Sangamon, etc. R. R. Co. v. Morgan, 14 Ill., 163 (1852); Pacific R. R. Co. v. Cass Co., 53 Mo., 17 (1873); Orange & Alexandria R. R. Co. v. Alexandria, 17 Gratt., 176 (1867); City of Dubuque v. Illinois Central R. R., 39 Iowa, 56, 86 (1874), and cases therein cited. See, also, *ante*, chap. 1, p. *34. [Philadelphia, W. & B. R. R. Co. v. Appeal Tax Ct., 50 Md., 397, 416 (1878); Appeal Tax Ct. v. Nor. Cent. R'y Co., 50 Md., 417, 420 (1878); Appeal Tax Ct. v. Pullman P. C. Co., 50 Md., 452, 457 (1878); Ricker v. American Loan & Trust Co., 140 Mass., 346, 349 (1885); Detroit v. Wayne Circuit Judge, 127 Mich., 604, 606 (1901); Salt Lake County v. Board of Equalization, 18 Utah, 172, 176 (1898). *Contra.* Cincinnati, N. O. & T. P. R. R. Co. v. Commonwealth, 81 Ky., 492, 503 (1883); Louisville & N. R. R. Co. v. State, 64 Tenn., 663, 802 (1875).]

[Pullman sleeping cars are personal property, and, under the statute, should be reported by the companies operating them, without regard to ownership. Carlisle v. Pullman P. C. Co., 8 Colo., 320, 324 (1885).]

[6] See Louisville and N. A. R. R. Co. v. The State, 25 Ind., 177 (1865); Bangor & P. R. R. Co. v. Harris, 21 Me., 533 (1842); Cumberland Marine Railway v. Portland, 37 Me., 444 (1854); State v. Severance, 55 Mo., 378 (1874); Binney's Case, 2 Bland. Ch., 146 (1829); Maus v. Logansport, P. & B. R. R., 27 Ill., 77 (1862), where the statute in question was con-

*Irrespective, however, of the question whether an an- [*370] nexation to the land is a parcel of the realty or personal in its nature, the election on the part of the taxing power to consider it as real estate involves the neeessity of treating it as such throughout all the proeess of the collection of the tax.[7]

II. Poor Rates, etc.

The Statute 43 Eliz., ch. 2, § 1 (*anno* 1601), entitled "An Act for the Relief of the Poor," enacts that competent sums, to be levied for the purposes in said Act specified, shall be raised by taxation of every occupier of lands, houses, tithes impropriate, etc., in the parish.

In the construction of this Statute it is to be observed that this poor rate is not considered a tax upon the land, but a personal charge in respect of the land;[8] and the occupier is ratable by whatever tenure he holds.[9]

sidered by the use of the terms "fixed and stationary personal property" with reference to the stations and track, to be intended to create a species of personal property not before known to the law, for the non-payment of taxes upon which the collector might levy upon the rails and remove them from the track for the purpose of selling them. Rolling-stock may by legislative enactment be made realty for certain specified purposes only, in which case it remains in other respects personalty. Chicago & N. W. R'w'y Co. v. Ft. Howard, 21 Wis., 44 (1866).

[See Ledoux v. LaBee, 83 Fed., 761, 765 (U. S. C. C., S. Dak., 1897).]

[In Illinois, rolling stock is personal property by statute. Ohio & Miss. R. R. Co. v. Weber, 96 Ill., 443, 448 (1880); Union Trust Co. v. Weber, 96 Ill., 346, 350 (1880).]

[Locomotives and cars are not taxable as "appendages" to a railroad. State Treas. v. Somerville & E. R. R. Co., 28 N. J. Law, 21, 26 (1859).]

[7] Flanders v. Cross, 10 Cush., 514 (1852), where it was *held*, that a house owned by a non-resident of the State and standing upon the land of another by his permission, which house was assessed to such non-resident as real estate and advertised for sale as such, could not subsequently be sold by the collector as personal property. Such house, moreover, if personalty, would not be taxable where it was situated, but at the residence of the owner. [But see Tunica County v. Tate, 78 Miss., 294, 299 (1900).]

[8] Rowls v. Gells, Cowp., 453 (1776).

[9] Bute (Lord) v. Grindall, 1 Term, 343 (1786); Rex v. Bell, 7 Id., 598 (1798).

[*371] *As to what constitutes an "occupier of land" within the meaning of the statute, there is more difficulty. This question has arisen in relation to a variety of different annexations or *quasi* annexations to the soil, which will, so far as they seem relevant to the subjects treated of in this volume, be here considered.

It is settled by a series of cases, that reservoirs for containing water, and pipes laid in the ground for conveying water or gas, from the use of which profit is derived to the proprietors, are comprehended within the legal description of land for which such proprietors are ratable as occupiers in the parish in which such articles are located; and this notwithstanding the ownership of the soil itself, in which they are situated, may be in other persons, the title of the land being, as we have seen, entirely immaterial;[10] and notwithstanding also the fact that

"If a disseisor obtain possession of land, he is ratable as the occupier of it." Lord Kenyon, in Rex v. Bell.

It seems settled, however, that in order to constitute an occupancy under the Statute, something more than a mere easement or license (the possession of the land remaining in another) is requisite. The occupation or possession should be an exclusive one. Rex v. Trent & Mersey Navigation Co., 4 B. & C., 57 (1825); Rex v. Mersey & Irwell Navigation Co., 9 B. & C., 95 (1829); Reg. v. Morrish, 32 L. J., M. C., 245 (1863); s. c., 10 Jur. (N. S.), 71; Watkins v. Milton-next-Gravesend, L. R., 3 Q. B., 350 (1868); Grant v. Oxford Local Board, L. R., 4 Q. B., 9 (1868). See, also, Cory v. Church Wardens of Greenwich, L. R., 7 C. P., 499 (1872).

See, however, Cory v. Bristow, L. R., 1 C. P. D., 54 (1875), reversing s. c., L. R., 10 C. P., 504; 44 L. J., M. C., 153, [affirmed by the House of Lords (1877), 10 Cox Mag., 572. In this case payment was made for the privilege, and was an interest, not a mere license.]

[10] Rex v. Bath, 14 East 609 (1811); Rex v. Rochdale Co., 1 M. & S., 634 (1813); Reg. v. East London Water-works Co., 18 Q. B., 705 (1852); s. c., 21 L. J., M. C., 174; Rex v. Chelsea Water-works Co., 5 B. & Ad., 156 (1833); Reg. v. West Middlesex Water-works, 1 Ell. & Ell., 716 (1859); Rex v. Brighton Gas Light Co., 5 B. & C., 466 (1826); s. c., 8 D. & R., 308; Regina v. East London Water-works Co., 21 L. J., M. C., 174 (1852); Talargoch Mining Co. v. St. Asaph Union, L. R., 3 Q. B., 478 (1868), a water-course partly open, partly tunneled, and party conducted in pipes. See, also, Providence Gas Co. v. Thurber, 2 R. I., 15 (1851). [Edinburgh Water Co. v. Hay (1854), Paterson (Scotch App.), 304; Municipal Council of Sydney v. Australian Gaslight Co., 3 N. S. W. St. R., 66 (1903); Municipal Council of Sydney v. Sydney Power Co., 3 N. S. W. St. R., 87 (1903).]

*another person is ratable for the occupancy of the sur- [*372] face of the land over the pipes.[11] In like manner an electric telegraph company is liable to be rated as an occupier of land in respect of its wires and posts placed along the line and on the land of a railway company; and this notwithstanding the latter may require their removal to a more convenient place, which only shows that the company are strictly tenants at will of the soil occupied by them.[12] So, also, as to a tramway company in

But where the act (32 Geo. 3, c. 69) authorized a rate upon the tenants and occupiers of all messuages, houses, warehouses, etc., and other buildings, gardens or garden-grounds, and other tenements, without using the word "land" used in the Stat. of Eliz., it was *held*, that under this act, the trunks, pipes, etc., for supplying water, did not constitute a tenement. Rex v. Manchester & Salford Water-works Co., 1 B. & C., 630 (1823). See, also, Reg. v. East London Water-works Co., 21 L. J., M. C., 49 (1851); s. c., *nom.*, East London Water-works Co. v. Mile End, Old Town, 17 Q. B., 512; Rex v. Mosley, 2 B. & C., 226 (1823). But in a similar case where after the enumerated subjects of the rate the word "hereditaments" was used, followed by an exception as to "meadow and pasture ground," the exception was regarded as showing that the word "hereditaments" was used in its larger sense, and the mains, pipes, etc., were held ratable. Rex v. Shrewsbury, 3 B. & Ad., 216 (1832). See, also, Sheffield United Gas Light Co. v. Sheffield, 4 B. & S., 135 (1863); s. c., 9 Jur. (N. S.), 623; Rex v. Birmingham Gas Light Co., 1 B. & C., 506 (1823); s. c., 2 D. & R., 735; Rex v. Birmingham & Staffordshire Gas Light Co., 6 A. & E., 634 (1837); s. c., 1 N. & P., 691; Reg. v. Cambridge Gas Light Co., 8 A. & E., 73 (1838); s. c., 3 N. & P., 262; Reg. v. Midland Railway Co., L. R., 10 Q. B., 389 (1875), and cases therein cited. The corporations in these cases had the exclusive right of occupancy by act of Parliament.

Perhaps it would be more correct to say that the corporations in these cases were the occupiers of the land filled by the pipes, though the form of expression in the text is often used in the cases. See Rex v. Chelsea Water-works, 5 B. & Ad., 156 (1833); Reg. v. West Middlesex Water-works, 1 Ell. & Ell., 716 (1859); Reg. v. Southwark & Vauxhall Water Co., 6 E. & B., 1008, 1014 (1856), per Wightman and Erle, JJ.

[Where, by statute, a township board had the exclusive right to lay gas-mains within the township, which they were required to keep in repair, and the owner of gas works supplied gas to the public through these mains, making the connection between the mains and the premises of consumers, *held*, that the township board and not the owner of the gas-works were the occupiers of the gas-mains. Southport v. Ormskirk Com. [1894], 1 Q. B., 196, aff'g [1893] 2 Q. B., 468.]

[11] Rex v. Chelsea Water-works, 5 B. & Ad., 156 (1833).

[12] Electric Telegraph Co. v. Salford, 11 Exch., 181 (1855); Reg. v.

respect of its tramway or track.[13] So, moorings fixed to the bed of the river, described as being "two large fan-shaped screws secured to the soil," and connected together by means of two chains, are, it seems, so attached to that part of the soil, that if a person is the occupier of the moorings he will be occupier of the soil and ratable therefor.[14] So, where a person established and maintained a pier formed of two barges, [*373] *one of which always floated and was connected by a platform with another which floated at high water, but at low water rested on blocks fixed in the bed of the river for that purpose, the barges being kept in their places by iron cables fastened to iron anchors permanently placed in the bed of the river, and by an iron chain from the barge nearest the shore to an iron staple fixed in stone steps or stairs abutting on a public street, the first barge being connected with said stairs by a platform not fixed but removed every night; the pier being solely controlled by the person maintaining it and permanently kept and used for embarking in and landing from steamboats, it was held, that the person maintaining such pier was an occupier of land by the use made of the blocks, the stairs for holding the staples and of the iron anchors in the bed of the river.[15]

North Staffordshire Rwy. Co., 3 Ell. & Ell., 392 (1860). See, also, Reg. v. East London Water-works Co., 21 L. J., M. C., 174 (1852); Cory v. Bristow, L. R., 1 C. P. D., 54 (1875); Rex v. Trent & Mersey Navigation Co., and other cases cited *ante*, p. *370.

[So, as to telephone wires and attachments upon buildings owned by others, although the attachments were easily removed, and were occasionally changed from one point to another. Lancashire Telephone Co. v. Overseers (1884), 14 Q. B. D., 267, aff'g 13 Q. B. D., 700.]

[13] Pimlico Tramway Co. v. Greenwich, L. R., 9 Q. B., 9 (1873); s. c., 43 L. J., M. C., 29. See, also, Rex v. Bell, 7 Term, 598 (1798), rail or wagon ways; Rex v. Granville, 9 B. & C., 188 (1829), a railway in a colliery; Reg. v. Midland Railway Co., L. R., 10 Q. B., 389 (1875), and cases therein cited.

[14] Watkins v. Milton-next-Gravesend, L. R., 3 Q. B., 350, 355 (1868), per Blackburn, J. The case was decided on the ground that there was not an occupancy but only a mere license. See, also, Cory v. Bristow, 44 L. J., M. C., 153 (1375); s. c., L. R., 10 C. P., 504 (1875); L. R., 1 C. P. D., 54 [aff'd (1877) 2 App. Cas., 262.]

[15] Forrest v. Greenwich, 8 Ell. & Bl., 890 (1858), following Regina v. Leith, 1 Ell. & Bl., 121 (1852). See Regina v. Morrison, cited *post*.

[Where pontoons were moored in an excavated basin, shackled to piles

On the other hand, however, it is held that the use of anchors and stones to moor a floating derrick for loading and unloading coal, which could be hauled on board by the machinery on the derrick, and were merely dropped into the river, no force being used for the purpose of fastening them, but only a small portion of ballast being removed from the bed of the river to enable the stones to lie flat to avoid injuring other vessels, does not constitute an occupation of lands so as to render the possessors of the derrick liable to be rated in respect of these moorings.[16] All this statement amounts to is that the derrick is anchored at the spot where she floats. It is not like an immovable thing that is susceptible of occupation; the derrick in such case is fastened to things which are accessories to herself, and which are movable things, whether silted over or not, and which constitute no more an occupation of any portion of the river than would the anchor of any other *vessel.[17] In Regina v. Morrison,[18] the [*374] tenants and occupiers of a ship-yard on the bank of a tidal river constructed a floating-dock for use in the repairing of vessels,

driven into the earth, connected with the shore by gangways, and used for repairing ships, *held*, that the occupation of the land was enhanced by reason of such pontoons being used in connection therewith, although the pontoons could be removed without much trouble, but had only towed away once in several years, for the purpose of being repaired. Tyne Pontoons Co. v. Tynemouth Union (1897), 76 Law T. R., 782.]

[16] Cory v. Church Wardens of Greenwich, L. R., 7 C. P., 499 (1872). See, also, Cory v. Bristow, L. R., 1 C. P. D., 54 (1875); s. c., L. R., 10 C. P., 504; 44 L. J. M. C. 153, where the moorings were permanent.

[17] Per Willes, J., in Cory v. Church Wardens of Greenwich (*supra*). See, also, Grant v. Oxford Local Board, L. R., 4 Q. B., 9 (1868). In Grant v. Oxford Local Board, *supra*, Hayes, J., said: "I think the cases have gone quite far enough in deciding that things which are substantially chattels are ratable as real property. This boat is a chattel, and it would certainly be a strong thing to say that it could be rated as real property, such as a tenement or an hereditament, unless there is a clear case of occupation, an occupation of something which is firmly and permanently affixed or attached to the soil itself." The boat in question was a barge possessed by the University Boat Club, moored to two posts fixed in the soil, by means of two iron rings attached to the barge and passing loosely round the posts. The case went off on the point that there was no proof of exclusive enjoyment of the posts.

[18] 1 Ell. & Bl., 150 (1852). [See Manchester, S. & L. R'y Co. v. Kingston-upon-Hull (1896), 75 Law T. Rep., 127.]

which dock floated at high water and grounded at low water upon the bed of the river, and was towed into deeper or shallower water as required in the course of getting vessels in course of repairs in and out of the said dock. The workmen passed to the said dock by a gangway, the ends of which rested respectively on the floating-dock and building-yard, such gangway being secured to the floating-dock by a rope passing through a staple in the gang-way and tied to the floating-dock. The floating-dock itself was moored to the bed of the river by chains attached to anchors or posts in the bed of the river, and also by chains passing round posts in the building-yard, each of which might easily be cast off or slackened. In order to use the floating-dock a license was necessary, and the harbor master had power to remove it when necessary for the convenience of the harbor. Upon this state of facts it was held, that the floating-dock *per se* was neither properly ratable under the Statute 43 Eliz., nor was it an accessory to the yard and ratable with it, as enhancing its ratable value. It was likened by Lord Campbell, C. J., to the case of a ship at anchor which occasionally grounds when the tide ebbs, and which might be approached either by a boat or a plank; and the decisions (hereinafter referred to) respecting machinery and other fixtures enhancing the ratable [*375] *value of realty, were considered as inapplicable. This case is to be distinguished from Regina v. Leith and Forest v. Greenwich, already cited, in that the piers in those cases were permanently fixed to the landing-place, and the one could not be used without the other.

Although the occupation of mere chattels *per se* does not come within the Statute,[1] still it is stated that lands and houses are to be rated according to their annual value, although that value may be in part derived from the annexation of personal chattels.[2] This doctrine was thus stated by Lord Denman, C. J., in Regina v. Guest:[3] "Real property ought to be rated ac-

[1] See Reg. v. North Staffordshire R'w'y Co., 3 Ell. & Ell., 392, 405 (1860), and cases cited *post* in this chapter.

[2] See Ferard Fixt., 258. See, also, Stat. 6 & 7 Wm. 4, c. 96, §§ 1, 3.

[3] 7 Ad. & E., 951 (1838); s. c., 2 N. & P., 663; W. W. & D., 651. The articles in question in this case (which seems to have been ruled on the authority of the case next cited *infra*) were engines and machinery of

cording to its actual value, as combined with the machinery attached to it, without considering whether the machinery be real or personal property, so as to be liable to distress or seizure under a *fieri facias*, or whether it would descend to the heir or executor, or belong, at the expiration of a lease, to landlord or tenant." "Such machinery" (as was observed by the same learned judge in Rex v. Birmingham & Staffordshire Gas Light Co., already cited) "constitutes a mode of occupying; * * * and even where the machine has not been attached, a house has been held ratable in respect of it, if the value of the house was increased by the machine."[4] The rule above quoted from Regina v. Guest, has been approved in a number of subse-

tenants, which were attached to frames serving as foundations by means of keys and jibs so as to be tightened, slackened or removed at pleasure.

In Rex v. Birmingham & Staffordshire Gas Light Co., 6 Ad. & E., 634 (1837), the steam-engines and machinery were for manufacturing purposes and were affixed to the houses or buildings.

[4] See, also, Staley v. Castleton, 33 L. J., M. C., 178, 182 (1864); s. c., 5 B. & S., 505, per Blackburn, J. This statement, however is questionable. See the following pages.

[Things on the premises for the purpose of making and which do make them fit as premises for the particular purposes for which they are used, whether attached to the soil or not, are to be taken into account in ascertaining the ratable value of such premises. Crockett v. Northampton (1902), 72 L. J., K. B., 320.]

[Under 58 and 59 Vict., cap. 41, greenhouses, erected by a tenant, although removable as against his landlord, should be valued as land. Gilchrist v. Assessor for Lanarkshire (1898), 25 Sess. Cas., 4th Ser., 589.]

[Machines attached by bolts to specially prepared foundations are "fixed and attached" within Section 42 of the Valuation (Scotland) Act of 1854; but machines resting by weight alone, and traveling cranes running upon rails bolted to wooden beams fixed to the walls, are not "fixed or attached." Dundee v. Carmichael (1902), 4 Sess. Cas., 5th Ser., 525.]

[Sec. 42 of 17 and 18 Vict., c. 91, provides that all machinery fixed or attached to lands should be considered as lands, and valued accordingly. *Held*, that while the mere fact of annexation alone would not make machinery realty for the purpose of valuation, yet the rules that apply between landlord and tenant did not apply, nor was the fact that machinery could be removed without injury conclusive; but steam engines bolted to a foundation for quasi-permanent use to a building specially adapted to their use, and whose removal would require alteration of the building unless replaced by engines of precisely the same size and shape, must be valued as land. Cowan v. Assessors for Midlothian (1894), 21 Sess. Cas., 4th Ser., 812.]

quent cases.[5] From the terms made use of in some of the [*376] *cases, it might be inferred that in order to make a chattel subject to a rate upon land and houses it is immaterial whether or not it is actually affixed to the premises subject to the rate, provided the value of the premises is increased by it. Some of the cases material to this question will be here referred to.

[5] Reg. v. The Southampton Dock Co., 14 Q. B., 587 (1850); Reg. v. Haslam, 17 Q. B., 220 (1851).

In Reg. v. The Southampton Dock Co., cranes, steam-engines, shears, derricks, dolphins, and other like ponderous machinery, attached to the freehold and essential to the business of a dock company, but capable of being detached as easily and with as little injury to the freehold as other fixtures put up for the purpose of the tenant's trade, and usually valued between incoming and outgoing tenant, were *held* not to be allowable deductions from the amount at which the ratable value of the property was assessed.

In Reg. v. Haslam, the articles in question were chambers used in the manufacture of sulphuric acid. These chambers were made of sheet lead, were 13 feet high, 13 wide and from 40 to 60 long, and weighed several tons each. They rested on and were supported by frame-work on foundation walls filled with sand, were attached to the frame-work by leaden rivets, and were united with the rest of the works constituting a part of the freehold by lead pipes which might be removed at pleasure by withdrawing them from the chambers after removing the rivets which in the case of some of the pipes fastened them to the frame-work. When these pipes were withdrawn the chambers rested on the ground by their mere weight. The court without determining whether or not they were annexed to the freehold, held that being used as a part of the fixed machinery of the works, and necessarily attached to the other buildings for the purpose of being so used, though capable perhaps of being removed without injury to the other buildings, they were properly considered as increasing the ratable value of the buildings. See, also, Reg. v. North Staffordshire Rwy. Co., 3 Ell. & Ell., 392 (1860).

[Things which make the premises fit as premises for the particular purpose for which they are used, are to be taken into account in ascertaining the ratable value of such premises. Machines in a boiler works, whether resting by their own weight, or attached to keep them steady, and although personal property, are to be taken into account as enhancing the value of the hereditament. Tyne Boiler Co. v. Longbenton (1886), 18 Q. B. D., 81, aff'g (1886) 17 Q. B. D., 651.]

[The rule in Ireland differs from that in England under the Poor Laws Acts; and, under 15 & 16 Vict., c. 63, machinery in no way connected with the building and with the water power of the mill, ought not to be assessed. Regina v. Bainbridge Union (1855), 7 Ir. Jur., 332.]

In Rex. v. St. Nicholas, Gloucester,[6] the facts were as follows: A machine was erected in a street leading by a house, for the purpose of weighing wagons, carts, etc., the steelyard part of said machine being always situated in said house which was called the "machine-house." The house independent of the machine was worth 5*l.* per annum, and the profits of the machine about 40*l.* per annum. The house was rated thus: "The mayor and burgesses of Gloucester for the machine-house, 24*l.*, 1*l.* 16*s.*" The Sessions held that the profits of the machine were not ratable, and amended the rate to 5*l.* only; but in the Court of King's Bench, the order of the Sessions was quashed, and the original rate held proper, Lord Mansfield observing *that [*377] though the case did not sufficiently explain whether the machine or steelyard was annexed to the freehold, yet the nature of the thing supplied the place of an explanation; it must from the very nature of it be annexed to the freehold; it was stated to be the machine-house, and the steelyard was the most valuable part of the house; and that the house was built for the machine, not the machine for the house. Willis and Butler, JJ., concurred, observing that the house being called the "machine-house" was evidently one entire thing. In this case the machine was clearly annexed to the realty, and the court seem to rely on that fact as furnishing a ground for their judgment.

The case of Rex v. Hogg,[7] has been supposed to be an authority for the rule that things let with a house under the same demise and yielding a profit are ratable whether affixed or not.[8] In this case a building called "The Engine-house," consisting of a bay of building about eighteen feet long and nineteen feet wide, in which was a machine or engine for carding cotton, was rented, together with the engine, as one entire subject, and was rated to the relief of the poor as "The Engine-house." The building, independent of the machine, was worth only two guineas per annum. The building and the machine together were rated at 36*l.* The engine was generally worked by water,

[6] 1 Term, 723, note (1783); s. c., Cald., 262.

[7] 1 Term, 721 (1783); s. c., Cald., 662.

[8] This case approaches nearer to the point than any other that has been discovered. In the other cases referred to the articles enhancing the ratable value were more or less attached to the realty.

but frequently by hand. The building was not a dwellinghouse, nor was it erected for the purpose of receiving the engine, but was formerly used for the purpose of turning bobbins and as a weaver's shop. The engine was not fixed to the floor, but the case did not state that it was not otherwise fastened, though it did state that it could be moved at pleasure and carried out and worked in any other place, either by water or manual labor, and was not adapted to any particular building. The case was considered not to be distinguishable from that of St. Nicholas, Gloucester, and the rating sustained. In this case Buller, J., [*378] expressed the opinion that personal prop*erty was ratable; and both Buller and Grose, JJ., thought the rate good, as both the house and the engine were let together under one lease as an entirety. Grose, J., further observed: "Suppose the owner of a tenement, which unfurnished would let only for a trifling rent, fitted it up as a malt-house and put a malt-mill into it and then let the whole together; the whole must be estimated together as any other leasehold property according to its value." Ashurst, J., however, seems to have regarded the question of annexation as a material one, for he said: "It is only stated that it is not fixed to the *floor;* but it may be fixed to the walls of the building without being fixed to the floor. And considering the nature of the thing, it must be so; for it is stated that the engine is worked by water, and the force of the water would displace it if it were not fastened to the building. We cannot take any facts that do not appear on the case, as it is now returned; and it is not stated negatively that the engine is not fixed to the house. At all events part of the subject is ratable; and the rate is on the *house* itself; and if the thing itself be ratable, the *quantum* of it is not for our consideration, but for that of the justices below." The true ground of these cases seems to be that the carding-engine and weighing-machine being demised together with the house as an entirety, were each considered as part and parcel of a building and were rated as such;[9] and the engine seems to have been fixed in some way, though it is not so stated in the case.

[9] See Rex v. Bilston, 5 B. & C., 851, 853 (1826), per Bailey, J.

See, however, Rex v. Birmingham & Staffordshire Gas Light Co. (*ante*), per Lord Denman.

Where the machinery is annexed to the realty in such a manner as to constitute a fixture, (whether removable or irremovable), or in other words, as to have lost to some extent its character as a mere chattel, it seems clear that the premises ought to be rated in accordance with their value as enhanced by such combination.[10] But the better opinion seems to be, *al- [*379] though as has been seen there are some cases and *dicta* which seem to support the contrary doctrine, that the profits arising from a mere movable, personal chattel not attached to the premises, ought not to be included in a rate professedly raised upon lands and houses only.[11] In the cases hereinbefore cited, except perhaps the case of Rex v. Hogg, the articles in

[10] See the cases already cited *ante;* also, Rex v. Granville, 9 B. & C., 188 (1829), where the lessee of a coal mine, being the occupier, was held liable to be rated for the improved annual value caused by the erection of a steam-engine and railway for working the mine; Reg. v. North Staffordshire R'w'y Co., 3 Ell. & Ell., 392 (1860). [Laing v. Bishopwearmonth (1878), 3 Q. B. D., 299, 306; see, also, Chalmers (1871), 11 Macpherson (Scot.), 983.]

See, also, Staley v. Castleton, 33 L. J., M. C., 178, 182 (1864), per Blackburn, J.; Brown v. Granville, 10 Bing., 69 (1833). In this case a watching and lighting act authorized a rate upon the occupiers of houses, shops, sheds, etc., and other buildings and tenements. A rate was imposed in respect of several buildings or engine-houses with the engines affixed to them, which were used for the convenient working of a coal mine. *Held*, that the engine-houses and the engines affixed thereto were ratable as being included under the term "shed," or, if not within that, then within the term "other buildings." The case was distinguished from Rex v. Bilston, hereinafter referred to, in that the buildings in question were not a mere adjunct of machinery, but were made a substantial subject of the rate imposed by the act which differed in its terms from the Stat. 43, Eliz.

[11] See Ferard Fixt., 262; Reg. v. Lee, L. R., 1 Q. B., 241 (1866); s. c., 7 B. & S., 188; 35 L. J., M. C., 105; 12 Jur., (N. S.), 225; Reg. v. North Staffordshire R'w'y Co., 3 Ell. & Ell., 392 (1860); s. c., 30, L. J., M. C., 68; 7 Jur. (N. S.), 363; Harter v. Salford, 34 L. J., M. C., 206, 208 (1865); s. c., 6 B. & S., 591, per Crompton, J. [See Municipal Council of Sydney v. Australian Gaslight Co., 3 N. S. W. St. R., 66 (1903); Municipal Council of Sydney v. Sydney Power Co., 3 N. S. W. St. R., 87 (1903).]

[In Chidley v. Churchwardens of West Ham. (1874), 32 L. T. Rep., 486, tanks forming the roofs of three houses, boiling backs, refrigerator, water-heater, mash-tuns, pumps, under-backs, wash-backs, reservoir and distilling apparatus were held not to be rated to the poor rate as part

question seem to have been annexed [12] to the realty. Some other cases on the subject will now be mentioned.

In Regina v. The North Staffordshire Railway Co., where this subject was considered, the Company in addition to its stock had been obliged to provide turn-tables, cranes, weighing-machines, stationary steam-engines, lathes, electric-telegraph apparatus, office and station furniture and gas-works for supplying the station with gas. The turn-tables and some of the weighing-machines were affixed to the freehold by means of an iron rod inserted in a large stone sunk in the land. The lathes and steam-engines were connected by means of iron bolts with the build-[*380] ings in which they *were placed. The telegraph apparatus consisted (1), of posts driven into the ground; (2), of wires passing through sockets annexed to the posts, but which wires might be disconnected from the posts without injuring or displacing them; and (3), of the electrifying machines which were in no way affixed to the freehold. The gas-works consisted partly of buildings and partly of gasometers, retorts, and the other usual plant for making gas; and of the pipes for conveying the same from the works to the railway stations. The other weighing machines, which were all used for the purposes of traffic along the line, and the office and station furniture were unconnected with the freehold. The question to be determined was whether the railway company was entitled to a deduction in respect to the additional amount of capital invested in the articles above described, or upon any and what portion of such items. The judgment of the court was delivered by Cockburn, C. J., who divided the said articles into three classes, and disposed of the same as follows: "First, things movable, such as office and station furniture; secondly, things so attached to the

of the premises. The articles were not attached to the premises except by weight, by pipes or by screws, and could be easily removed, and are all known in the trade and sold both as new and as second hand.]

[12] In Regina v. Haslam, 17 Q. B., 224 (1851), the case found that the chambers were "attached" to the freehold, but not "affixed thereto." ["Colridge, J.—This question seems to be one of fact. Patterson, J.—I do not know what is meant by 'attached' to the freehold, but not 'affixed.' Whether they are really let into the land or not, would be a question of fact; whether they would go to the heir or executor, would be a point of law."]

freehold as to become part of it; and, thirdly, things which, though capable of being removed, are yet so far attached as that it is intended that they shall remain permanently connected with the railway or the premises used with it, and remain permanent appendages to it as essential to its working. It is clear that, in respect of the first class of articles, a deduction should be allowed. It is equally clear that no deduction should be allowed as to the second. As to the third, the question is finally settled by the decision of this court in the case of Regina v. Southampton Dock Co., 14 Q. B., 587."[1] In the case last cited the articles in question were conceded to be fixtures; and from the foregoing description of the articles comprised in the third class, these articles also are believed to be fixtures, and hence to partake during annexation to some extent of the character of the realty, though, if erected by a tenant, they would undoubtedly for some purposes and in favor of some persons be considered as personalty.

*In Regina v. Lee, already referred to, the subject [*381] again came under consideration in the Court of Queen's Bench, and it was held that, on assessing gas-works to the poor-rate, in ascertaining the gross estimated rental a deduction ought to be allowed in respect to the cost of the meters, which belonged to the gas company, but were connected with the service-pipes by solder, and by means of those pipes with the company's mains, they being mere chattels; but that no deductions ought to be allowed in respect of

(1.) Retorts in which the coals were carbonized, and which consisted of circular pieces of clay to which the heat was applied, and also the arches containing them, the pipes which permit the gas to ascend from them, the iron faces of them and the pipes over the arches, conveying the gas from them through the purifiers to the tanks where it was received by the gas-holders, notwithstanding the whole of these parts were distinct and severable from the floor and not attached to it by mortar or cement, but only packed in fire-clay to hold them in place; such retorts being considered not as removable fixtures, but as fixtures so connected with the freehold as to have become parcel of it.

(2.) Purifiers, which were massive iron vessels standing on a

[1] *Ante* p. *375.

brick base but not fixed thereto, but connected on the sides by means of screw-bolts fastened into the plates of the purifier, with pipes passing through the soil and connecting with the retorts, tanks and gas-holders.

(3.) Steam-engines used for driving the machinery, fastened by screw-bolts to a stone base fixed in the soil.

(4.) Boilers set in brick-work fixed in the soil.

(5.) Gas-holders, which were hollow cylindrical vessels of plate iron open at the bottom, but covered at the top, rising and falling by means of iron columns and pulleys into circular tanks sunk in the ground, into which the gas passed through purifiers from the retorts.

(6.) Trade-fixtures, such as pumps and exhausters, which were fixed to the freehold, but which would be removable as tenant's fixtures. The articles specified in the last five classes were considered by Cockburn, C. J., in rendering his judg- [*382] *ment, to fall within the principle of the cases of Regina v. Southampton Dock Co., and Regina v. North Staffordshire Railway Co., hereinbefore referred to, and the classification of the articles in question in the last-mentioned case was approved and applied to this. The court in rendering their judgment in this case place their decision apparently also upon the same satisfactory grounds as are applicable to ordinary cases of fixtures, that is, upon the existence of an intention to make the annexation a permanent improvement of the inheritance; and thereby place this branch of the law of fixtures upon a more satisfactory basis than it seemed to occupy theretofore. The case of Walmsley v. Milne,[1] was approved and applied, as furnishing a principle applicable to the decision of the case. Blackburn, J., referring to this case and that of Hellawell v. Eastwood,[2] said: "The idea is throughout the same—if the things are annexed, though but slightly, with a view to the enhancement of the inheritance and the permanent improvement of it, they may be considered as part of it for which a hypothetical tenant would be considered ratable. Now, applying that rule to the present case, though I was inclined at first to take an opposite view as to some of these articles, they are all

[1] 7 C. B. (N. S.), 115 (1859); s. c., 29 L. J. (C. P.), 97.
[2] 6 Exch., 295 (1851); 20 L. J. Exch., 154.

with the exception of the meters, attached to the premises, although but slightly; nevertheless I think it is clear they all are in fact attached to the premises, and equally clear they all are in fact attached to the premises with the view of enhancing the benefit of the premises, so as to come within the principle laid down in the cases I have mentioned. The meters stand on a different footing. They are chattels themselves, except so far as they are attached to the houses in which they are put up. They are attached to the houses by a pipe which comes in through the wall and is fastened to the meter. If the meter was attached to the house so as to render it part of the house to improve it, then it would become fixed property. But, in fact, it is obvious that the meters are kept as the company's meters, to be used as their chattels for meas*uring the [*383] gas, and were never intended to be for the benefit of the house to which they are attached at all; they are not part of the inheritance of the company, and cannot be said to be so. Mr. White endeavored in his argument to make out that a meter occupies part of the space of a house, and therefore the company did by the meter occupy part of the house. That is not so. Although the meter is firmly fixed to the house, steadied by being fixed, that does not make the company the occupier of any portion of the house; any more than a person who has hired out or let a chattel which is not fixed to the house but enjoyed as a chattel. For these reasons I think the meters are properly matters of deduction, and the rest are not."

The rule hereinbefore laid down has been considered to be subject to this limitation, that where the principal subject-matter is not liable to be rated, neither is anything liable that is annexed thereto, and which is accessory to such principal subject-matter.[3] It was accordingly held in Rex v. Bilston[4] that a steam-engine erected solely for the purpose of drawing water from an iron-stone mine (which was by statute exempt from rate), and which was of no other use, was also exempt. This doctrine so far as it applies to the case of mines, is to be taken with some limitation; and the case of Rex v. Bilston has been criticised in subsequent cases, and its doctrine con-

[3] Ferard Fixt., 264.

[4] 5 B. & C., 851 (1826); s. c., 8 D. & R., 734.

siderably restricted, if not overruled. The cases agree that if the engine in that case was actually part and parcel of the mine which was exempt, it would be exempt also; and it seems that the case, if now supportable at all, must be upon the ground that the engine was in fact a part and parcel of the mine.[5] But it seems to be settled that where the surface, with that which has been erected or constructed upon it, is essential to the working of the mine, and where as such it would have a value as surface land distinguishable and distinguished from [*384] *the mine itself, such surface land and the buildings erected upon it are liable to the poor rate and ought therefore to be assessed.[6] And it was accordingly held in said case of Guest v. East Dean, that the appellant, who was owner of iron mines (non-ratable) and who rented two and one-half acres of surface land partly over and partly adjoining the mines, and occupied both mines and surface together using the surface for the purpose of working the mines and getting ore, and who had erected thereon buildings, engines, boilers, machinery, tramways, etc., which were used solely for and were necessary to the use of the mines and which without the mines would be practically valueless, was ratable in respect of such surface lands, buildings, machinery, tramways, etc., though occupied with a non-ratable subject-matter.[7]

III. Parochial Settlements.

It was enacted by the Statute, 13 and 14 Car. II., c. 12, § 1 (*anno*, 1662), that within forty days after any poor person came to settle in a tenement under the yearly value of 10*l.*, two justices of the peace might remove such person or persons, if likely to become chargeable to the parish he or they should

[5] See Guest v. East Dean, L. R., 7 Q. B., 334 (1872;) Talargoch Mining Co. v. St. Asaph Union, L. R., 3 Q. B., 478 (1868); Kittow v. Liskeard Union, 44 L. J., M. C., 23 (1874). See, also, Brown v. Granville, 10 Bing., 69 (1833), *ante* p. *379, note; Rex v. Granville, 9 B. & C., 188 (1829).

[6] Guest v. East Dean (*supra*), per Cockburn, C. J.

[7] See, also, Talargoch Mining Co. v. St. Asaph Union (*supra*); Reg. v. Metropolitan Board of Works, L. R., 4 Q. B., 26 (1868).

come to inhabit, to the parish where he or they were last legally settled, in default of their giving sufficient security, etc.

By the statute, 3 & 4 W. & M., c. 11, § 6 (*anno*, 1691), persons charged with and paying their shares towards the public taxes or levies of the town or parish, gained settlements.

By the Statute 35 Geo. III., c. 101, § 4 (1795), the tenement in respect of which the taxes were paid, must be of the yearly value of 10*l.*[8]

*In questions respecting the right to a settlement un- [*385] der these statutes, it is sometimes the case that the value of the land taken separately from the annexations thereon will fall below the sum prescribed by statute as necessary to confer a settlement, but if taken in connection therewith it will suffice for that purpose. In such cases it obviously becomes a very material inquiry whether the value of such annexations is to be included in the calculation of the requisite sum or rejected therefrom. The cases where this subject has been considered will be here referred to.

In Rex v. Londonthorpe,[9] the pauper rented a tenement at the yearly rent of 6*l.* in which he resided nearly three years. During the greater part of that time he also rented a piece of waste ground at the yearly rent of 10*s.* 6*d.*, upon which he had the privilege of building a post-wind-mill, and which he was to be at liberty to remove at pleasure. He accordingly built upon the waste ground a post-wind-mill at an expense of 120*l.* constructed upon cross traces laid upon brick pillars, but not

[8] See, also, 59 Geo. III., c. 50; 6 Geo. IV., c. 57, § 2; 1 Will. IV., c. 18, §§ 1, 2.

The various statutes on this subject will be found referred to in 4 Fisher's Com. Law Dig., p. 6767.

[9] 6 Term, 377 (1795). See Rex v. Minworth, 2 East, 198 (1802).

A contract for a standing-place in another's mill for a carding-machine (the party's own property) which was fastened to the floor and roof for the purpose of being worked by the steam-engine of the mill, for which the party was to pay 20*l.* per year, each to give the other three months' notice to quit, is not the taking of a tenement, but merely a contract for liberty to stand and work the machine in a room of the mill, and therefore confers no settlement. See Rex v. Mellor, 2 East, 189 (1802); Rex v. Dodderhill, 8 Term, 449 (1800); Rex v. Tardebigg, 1 East, 528 (1801); Rex v. Hammersmith, 8 Term, 450 (1796); Robinson v. Learoyd, 7 M. & W., 48 (1840).

attached or affixed thereto, which was the usual mode of building mills of that nature. He let the mill for a quarter of a year at the rate of 9*l.* per annum and during this time resided in the tenement of the rent of 6*l.* per annum. He afterwards sold the mill as a chattel interest, and it was removed by the purchaser without any interruption by the landlord; no rates were ever paid or demanded for the mill, or the ground on which it stood. The question was whether the pauper by living upon his tenement of 6*l.* a year, and renting the piece of land at 10*s.* 6*d.* and afterwards building and working the mill for the time aforesaid and letting the same for a part of the [*386] *term as above stated, was to be considered as holding 10*l.* a year and to have gained a settlement in respect thereof. It was argued in support of the proposition that a settlement was gained by the pauper's renting a tenement of 10*l.* a year, that he first rented 6*l.* per annum, then 10*s.* 6*d.*, then 9*l.* per annum, the last being the sum for which the mill was afterwards let by the tenant himself. This, it was contended, might be considered to be the taking of a tenement of 10*l.* per annum on the same principle on which it had been held that the renting of a rabbit-warren,[10] or a land sale colliery,[11] is the taking of a tenement, where in the one case the value of the rabbits, and in the other the value of the horses, gins, ropes, and other chattels merely for working the mines was added to make up the amount required. But Lord Kenyon in delivering the judgment of the court observed: "This wind-mill, as described in the case, is nothing but a chattel. And if in questions of this kind we were merely to consider the ability of the pauper, without at the same time considering whether he rented a tenement, we should abandon the statute altogether and the decisions upon it. It might as well be said that an iron malt-mill would give a settlement. This post-wind-mill was the sole property of the tenant himself; and it was not fixed in the ground, but detached from it. But in order to confer a settlement it should be so connected with the land as, in legal contemplation, to fall within the description of a tenement." Grose,

[10] Kinver v. Stone, 1 Str., 678 (1726); Rex v. Piddletrenthide, 3 Term, 772 (1790).

[11] Rex v. North Bedburn, 2 Conset's Bott, 155.

J., in the same case observed: "It is no more a tenement than a large coffee-mill put up by the tenant in his house."[12]

The case of Rex v. Londonthorpe, was followed in Rex v. Otley.[13] In this case a pauper rented a wind-mill, a brick cot-*tage, and a small garden, at a rent of £30 per annum, [*387] for over six years, and during that time held, occupied, and actually paid for the same the said sum of £30 per annum, and was rated to and paid several rates for the relief of the poor in respect of the cottage and garden, and also of the mill, at the estimated value of 6*l.* per annum. The cottage and garden with the mill were together of more than the annual value of 10*l.*, but the cottage and garden, exclusive of the mill, were not of that annual value. The mill was of wood, of a circular form and had a brick foundation; but the wood-work was not inserted in the brick foundation, but rested on it by its weight alone. No part of the machinery touched the ground or the foundation, and the mill would work on the ground as well as on the brick foundation. Upon these facts it was held on the authority of the preceding case, that the mill not being affixed to the freehold nor to anything connected therewith, was not parcel of a tenement, and, therefore, the pauper gained no settlement.

Whatever may be thought as to the correctness of the principle of annexation applied in these two cases, they are very clearly authorities for the rule, that in order to confer a settlement, the property by which the value of the tenement is enhanced and made equal to the annual value of 10*l.*, must be so annexed to the realty as to become a parcel of the tenement, or in other words it must be a fixture, as distinguished from a mere personal chattel.

In Rex v. St. Dunston,[14] the question arose under the Statutes 3 & 4 W. & M., c. 11, s. 6, and 35 Geo. III., c. 101, § 4, hereinbefore referred to. In this case a landlord demised to a tenant a house and fixtures in the parish of St. Dunstan at an annual

[12] No reference is made by the court to the agreement as to the removal of the mill in this case, but the case seems to have been decided on the sole ground that there was no annexation to the land. See *ante*, chap 3.

[13] 1 B. & Ad., 161 (1830). See, also, Wansbrough v. Maton, 4 Ad. & E., 884 (1836).

[14] 4 B & C., 686 (1825).

rent of 10*l.*; and the tenant occupied and paid rates in respect of the same; but the house was rated at less than 10*l.* per annum. The fixtures consisted of a stove and grates fixed with brick-work in the chimney-places, but capable of removal without injury to the chimney-places; and two cupboards standing on the ground supported by hold-fasts and also removable [*388] *without other injury to the walls than a few marks of nails. The use of these several articles was worth about 6*d.* per week. The Court of Quarter Sessions confirmed the order of removal, but stated their opinion to be that if any deduction, however small in amount, was to be made in respect of the above-mentioned articles, the tenement would not be of the annual value of 10*l.* The Court of King's Bench confirmed the order of the Court of Quarter Sessions and held that the fixtures constituting part of the tenement demised, and the whole being of the annual value of 10*l.*, the tenant gained a settlement by the payment of rates.

IV. Qualifications of Electors as related to Real Property Improved by Annexations thereto.

The subject of this section seems never to have come before the courts of this country for consideration; and under the political system prevailing in this country, it probably never will. Should it, however, ever become a material subject of inquiry, it would, it is believed, be governed by the principles already laid down in the preceding pages. Only one case on the subject has been found in the English reports, and that was the case of a vote in the case of the county of Bedford.[1] In that case one Joseph Marshall had voted for a wind-mill which stood in a common field in the parish of Yielding, upon a plat of grass ground large enough to clear the sway of the wings, inclosed within a fence put up by the voter. It was fixed on a post, upon pattens, in a foundation of brick-work.

1 2 Luder, Case xii., p. 440 (1785).

[Where a person to be qualified for election to the office of councillor, must be an occupier of "land," *held*, that the second floor of a house, under his exclusive control as tenant, was land. *Re* Horwitz, 26 Vict., 500 (1901).]

Nothing was expressly proved to show this plat of ground to belong particularly to the voter; and nothing on the other hand, to show that it did not. The counsel objecting to the vote, among other things, said, that as the voter had expressly described his freehold to be a wind-mill, he could not have availed himself of the value of any land with it, if he possessed *any; but according to the evidence there was no reason [*389] to suppose this; therefore, the question was simply, whether this wind-mill was a freehold estate; which they contended, it was not, but merely a chattel; that it did not follow, from the right of an heir to take property by descent, that such property was always of a freehold nature, for there are many chattels which go to an heir, *e. g.*, a term of years in trust to attend the inheritance. Therefore such descent is not alone a proof of freehold, if in this case the voter could prove the descent as to the mill, which, however, is not the case. It was also insisted that the case of a wind-mill was not distinguishable from the case of the fire-engine in Lawton v. Lawton, from the cider-mill in the case before Lord Chief Baron Comyns; and that the case of the salt-pans in Lawton v. Salmon did not militate against the argument deducible from those cases.

On the other hand it was insisted that according to the evidence of the case, the voter must be presumed to have a right to the soil on which his mill stood; and therefore no objection could arise from that quarter. It was also insisted that in the cases on which the opposite argument was founded, (if they were in point to the wind-mill) the nature of the *subject* was not considered intrinsically, but always with relation to the *persons* between whom the question had arisen; the modern determinations, founded on principles of public convenience, favoring the executors of such persons against the successor to the land. And that upon general principles, considered as a building fixed in the soil, the mill must be accounted a part of the freehold.

The vote in respect of this wind-mill was held to be good by the committee, upon the principle doubtless (for no reasons are assigned for the decision), that by reason of its annexation it was to be considered as land; and that, if by its annexation the value of the land was enhanced to the prescribed amount, the right of voting was conferred.

[*390] CHAPTER XIII.

LEGAL AND EQUITABLE REMEDIES RESPECTING FIXTURES.

I. Of the Action of Waste, and Case in the Nature of Waste.

Many of the early cases respecting the right to fixtures arose in the form of an inquiry whether their severance amounted to an act of waste;[1] and, with respect to the remedy therefor, as the old form of proceeding by writ of waste (though now obsolete in most of the United States as well as in England), is the foundation of the modern form of action therefor, it is deemed advisable to refer briefly to some particulars relating thereto with references to authorities in which a more full discussion of the subject may be found, if desired.

At the common law there were two remedies for waste, viz: by writs of prohibition, or of *estrepement* (to be hereafter noticed), for the prevention of waste, and a writ of waste for waste actually done. Lord Coke[2] thus states the rule at common law: "At the common law waste was punishable in three persons, viz: tenant in dower, tenant by the curtesie, and the guardian,[3] but not against tenant for life, or tenant for yeares;[4] and the reason of the diversity was, for that the law created their estates and interests, and therefore the law gave against [*391] *them remedy; but tenant for life, and for yeares came in by demise and lease of the owner of the land, etc., and there-

[1] As to what constitutes waste and the different kinds of waste, see Greenl. Cru. Dig., tit. 3, ch. 2; 1 Wash. Real Prop., 107 *et seq.;* Waples v. Waples, 2 Harr., 281 (1837).

[2] 2 Inst., 299, 300. See, also, 12 H. 4, 3; 21 H. 6, 28; Doct. & Stud., lib. 2, cap. 1; Regist., 72; 1 Inst., § 67; Co. Lit., 53 b, 54 a.

[3] In chivalry.

[4] See, however, 2 Reeve's Hist. Eng. Law, 73, 184; 4 Kent Com., 80. [See, *ante,* p. *82.]

fore he might in his demise provide against the doing of waste by his lessee, and if he did not, it was his negligence and default."

For waste actually done the tenant in dower, and likewise the tenant in curtesy were at common law subject to two punishments, viz: to yield damages to the value of the waste, and a keeper or curate to be appointed over them, to prevent any future waste being done; and the guardian in chivalry as a punishment lost the custody of his ward, was obliged to pay the value of the waste, and was subject to be fined by the king for his breach of the trust reposed in him.[5]

The action lay against the tenant in dower, or by the curtesy, notwithstanding they had assigned over their estates; but it did not at common law lie against the assignee, even for waste done after the assignment.[6] So, if the heir granted away the reversion and the tenant attorned, the action failed at the common law (though it lay under the Statute of Gloucester, *infra*) the new estate being created by the act of the parties.[7]

The doctrine of the common law, that where lands were granted to a person for life, he was not liable to an action for waste unless restrained by express words in the conveyance from the commission thereof, being found very inconvenient, as tenants took advantage of the ignorance of their landlords and committed waste with impunity, the defect was sought to be remedied by the Statutes of Marlebridge, 52 Hen. III., c. 23, (*anno,* 1267), and Gloucester, 6 Edw. I, c. 5 (*anno,* 1278), by which latter Statute an action of waste was given "against him that holdeth by the law of England, or otherwise for term of life, or for term of years, or a woman in dower," and it was also provided that "he which shall be attainted of waste shall lose the thing which he hath wasted, and moreover shall rec-
*ompense thrice[8] so much as the waste shall be taxed [*392]

[5] 2 Inst., 300; 10 H. 3, Waste, 138; 20 H. 3, ib., 139; 34 E. 3, ib., 146.

[6] 2 Inst., 300, 301; Temps. E. 1, Waste, 132; 30 E. 3, 16; 38 E. 3, 23; 40 E. 3, 33; 11 H. 4, 18; Doct. & Stud., l. 2, ca. 1; F. N. B., 56.

[7] 2 Inst., 300, 301; 1 Greenl. Cru. Dig., tit. 3, ch. 2, § 31.

[8] By the Statute of Marlebridge the actual damages were recoverable, and the party committing the waste was liable to "be punished by amerciament grievously." See the Statutes *ante*, p. *83. See generally as to these Statutes, 2 Inst., 299, *et seq.;* Co. Lit., 53 b, *et seq.;* 3 Bl.

at." In the construction of this Statute, tenants from year to year, and also tenants for a part of a year were held punishable for waste.[9] This action depends upon the existence of privity between the parties;[10] so that if after waste done the reversioner grant over his reversion, though he take back the whole estate again, yet is the waste dispunishable.[11] And although, as observed by Lord Coke, the assignee of the tenant by the curtesy, or in dower, is within the letter of this law, for he holds in some manner for life, yet no action of waste shall be brought by the heir against the assignee, but only against the tenant by the curtesy or in dower; but if the heir grant away the reversion, and the assignee attorn, there the grantee by this Statute shall have an action of waste against the assignee, and the plaintiff must declare upon the Statute, there being in that case no action of waste at the common law.[12]

No person was entitled to an action of waste, unless he had the immediate estate of inheritance, and if there was an intervening vested estate of freehold, during its continuance the action of waste was suspended.[13]

The remedy by writ of waste was in England abolished after [*393] *June 1st, 1835, by the statute 3 & 4 Will. IV., c. 27, s. 36, 37.[14] In the United States the subject of waste and the

Com., 225; 1 Cru. Dig., tit. 3, ch. 2, § 26, *et seq.;* 1 Wash. Real Prop., 118. It is to be observed that the action of waste was in its nature a mixed action; real because on a judgment against the defendant the plaintiff recovered the thing wasted, and personal because recovery was had of treble damages. 3 Bl. Com., 228.

[9] 2 Inst., 302; Co. Lit., § 67, 52 b.

See, however, Lloyd v. Rosbee, 2 Camp. N. P., 453 (1810), where Lord Ellenborough refused to give a similar construction to the Stat. 4, G. 2, ch. 28, which specified tenants for life, lives, or years.

[10] Co. Lit., 53 b; 2 Inst., 301; Foot v. Dickinson, 2 Met., 611 (1841).

[11] Co. Lit., 53 b.

[12] 2 Inst., 301.

[13] Co. Lit., 53 b, 218 b, note 122; Com. Dig., Waste, C 2, C 3; Waples v. Waples, 2 Harr., 281 (1837).

[14] It had already fallen into disuse, though instances where the old form of procedure had been recognized and adopted are to be found in the modern cases of Redfern v. Smith, 2 Bing., 262 (1824), where it was held that a verdict in a writ of waste upon the Statute of Gloucester, simply finding the plaintiff's damages and not the place wasted, would not be sustained; and The Keepers of Harrow School v. Alderton, 2 B. & P.,

remedies therefor are variously regulated by statute, the consideration of which in detail would be foreign to the purposes of this work.[15] The ancient remedies for waste by writ of *estrepement*, and writ of waste at common law are declared by Chancellor Kent[16] to be essentially obsolete, though in some instances they have been adopted in practice in some of the states.[17]

The remedy now generally employed in cases where formerly an action of waste was the appropriate action, and which has superseded the action of waste, is an action on the case in the nature of waste, which has been found to be much more convenient and better adapted for the recovery of mere damages than the action of waste in the *tenuit*. This action, as has already been observed, has for its origin the ancient form of procedure already referred to. It is, however, applicable to many cases where an action of waste did not lie.[18] It may *be brought by him in reversion or remainder for life [*394]

86 (1800), where in an action of waste the jury having given three farthings damages only, the court gave the defendant leave to enter up judgment for himself; on the principle, evidently, that *de minimis non curat lex*. See 3 Bl. Com., 228; Barry v. Barry, 1 Jac. & Walk., 653 (1820). [Stevens v. Rose, 69 Mich., 259, 269 (1888).]

For a more full consideration of the subject of the action of waste, see, generally, Co. Lit., 53 a; 2 Inst., 145, 299, *et seq.;* Fitz. Nat. Brev., Writ of Waste; Com. Dig., Waste; 3 Bl. Com., 223; 2 Id., 281; Bull. N. P., 119 a; 1 Cru. Dig., tit. 3, c. 2; Greene v. Cole, 2 Saund. (Wms.' ed.), 234, 252 (1681), *et seq.*, and notes; 2 Wms.' Notes to Saunders' Reports (Lond. ed., 1871), p. 644 *et seq.;* and the authorities hereinbefore cited.

[15] See, generally, 1 Greenl. Cru. Dig., tit. 3, ch. 2, § 26 *et seq.* & notes; 4 Kent Com., 76 *et seq.* & notes; 1 Wash. Real Prop., 118 *et seq.* & notes.

[16] 4 Kent Com., 77, 81.

[17] See 4 Kent Com., 77 *et seq.*, notes; Greenly v. Hall, 3 Harring., 9 (1839); Waples v. Waples, 2 Id., 281 (1837); Loomis v. Wilbur, 5 Mason, 13 (1827); Sackett v. Sackett, 8 Pick., 309 (1829); Smith v. Follansbee, 13 Me., 273 (1836); Crocker v. Fox, 1 Root, 323 (1791); Rose v. Hays (1791), cited in Crocker v. Fox (*supra*); Jones v. Whitehead, 1 Pars. Sel. Cas., 304 (1847).

[18] See the advantages of this form of action compared with the action of waste in Greene v. Cole, 2 Saund. (Wms.' ed.), 252 (1861), note 7; 2 Wms.' notes to Saunders' Repts. (Lond. ed., 1871), p. 644 *et seq.* [Dickinson v. Baltimore, 48 Md., 583, 589 (1878).]

or years as well as in fee or in tail.[19] But it can only be brought for an injury done to a reversionary interest, and hence does not lie by a tenant for years.[20] It may, however, be sustained by a reversioner against a stranger for an injury actually committed to the reversionary estate while in the possession and occupation of a tenant,[21] though waste may not. The interest of the reversioner must, however, be a vested interest at the period when the waste was committed, a contingent interest not sufficing to support the action; and therefore where, A. and his wife being seized of a messuage for their joint lives and the life of the survivor of them, all the estate and interest of A. became vested in the defendant who permitted waste during A.'s lifetime, it was held that the wife who survived her husband could not maintain an action on the case against the defendant in respect of such waste.[22]

It will be perceived from what goes before that the action upon the case in the nature of waste is an appropriate form of action to be brought by one in reversion or remainder to try

[19] Note 7 to Greene v. Cole (*supra*); McLaughlin v. Long, 5 Har. & John., 113 (1820); West v. Treude, Cro. Car., 187 (1630); s. c., Jones, 224. See, however, *dictum* in Peterson v. Clark, 15 John., 205 (1818). [See Dickinson v. Baltimore, 48 Md., 583, 589 (1878).]

[Action on the case will not lie for permissive waste. Smith v. Mattingly, 96 Ky., 228, 234 (1894).]

The plaintiff is also entitled to costs in this action, which he cannot have in an action of waste. Note 7 (*supra*).

[20] McLaughlin v. Long, 5 Har. & John., 113 (1820). See, also, Page v. Davidson, 22 Ill., 112 (1859).

[21] Chase v. Hazelton, 7 N. H., 171 (1834); Forbes v. Williams, 1 Jones's Law, 393 (1854); 1 Chitty Plead., 157, 158; 1 Wash. Real Prop., 119. See, also, Brown v. Bridges, 31 Iowa, 145 (1870). See, however, *dictum* of Patteson, J., in Bacon v. Smith, 1 Q. B., 345 (1841), who, citing Co. Lit., 53 b, expressed the opinion that this action also "consisted in privity"; Foot v. Dickinson, 2 Met., 611 (1841), holding the same point. [Consolidated Coal Co. v. Savitz, 57 Ill. App., 659 (1894); Torrey v. Burnett, 38 N. J. Law, 457, 458 (1875); see, also, Dickinson v. Baltimore, 48 Md., 583, 589 (1875).]

[22] Bacon v. Smith, 1 Q. B., 345 (1841); s. c., 4 P. & D., 651. See, also, Peterson v. Clark, 15 John., 205 (1818), cited again *post* in this section.

[Alienation of the property by the reversioner does not affect his right to recover for waste already committed. Action on the case in the nature of waste is an equitable action, and not to be discountenanced by any technical consideration. Dickinson v. Baltimore, 48 Md., 583 (1878).]

the question whether the removal of articles annexed to the freehold is rightful, or whether the thing annexed has become an irremovable fixture and parcel of the reversionary estate. It may be brought in such a case by the reversioner against *a tenant in possession whether for life, for years, at [*395] will or at sufferance.[23] And where a lessee for years assigned by way of mortgage his lease and all his estate and interest in the premises, and continued in the occupation of the premises till his bankruptcy, it was held that the mortgagee might declare in case as reversioner against the assignee in bankruptcy of the tenant for the removal of the fixtures from the premises whereby they were dilapidated and injured.[24] But in those States

[23] West v. Trende, Cro. Car., 187 (1630); s. c., Jones, 224; Hitchman v. Walton, 4 M. & W., 409 (1838).

[24] Hitchman v. Walton, 4 M. & W., 409 (1838). Lord Abinger, C. B., in delivering his opinion in this case said: "The defense set up by the first plea is, that Pett was not the tenant of the plaintiff. Now, if a mortgagor be not tenant to the mortgagee, in what relation does he stand? He is not a trespasser; he is not a servant, because the mortgagee is not in possession; the ordinary terms known to the law are, a mortgagee *in* possession and *out of* possession. Then look at the very terms and understanding of a mortgage. It is either made so as to vest the absolute interest in the mortgagee, without any proviso for a future defeasance on non-payment of the mortgage money; if so, the mortgagee becomes the absolute legal owner, with the right to turn out the mortgagor at once; but if he chooses to allow him to remain in possession, in what character does he stand but that of a tenant, since it is clear he is neither a trespasser nor a servant? On the other hand, if there be a stipulation that he shall be allowed to remain in possession for a time, by the very terms of the deed he is a tenant for that time, and is in possession for a *term;* if he continues in possession, and holds over, he continues on the same terms as during that time. Then how is the mortgagee to declare for an injury to his ownership? He must either declare as reversioner, as it was held in Patridge v. Bere [5 Barn. & Ald., 604 (1822)] that he might, or else he must set out all the special circumstances at length: the former is by much the more convenient mode. Mr. Platt says, that in order to constitute a reversion there must be a portion of the estate carved out, on which the reversion shall be incident; the answer is that the portion of the estate carved out is the portion of time during which the mortgagor is allowed to remain in possession, and the mortgagee must determine the will before he can turn him out. No doubt he may maintain ejectment without any previous demand of possession; but the ejectment is maintained on the fiction that the lessor is admitted by the consent rule, to have entered into possession, and to

[*396] *where a mortgage is held to be only a security and not a conveyance of the title, a mortgagee cannot maintain an action on the case in the nature of waste against the mortgagor (at least not till after a forfeiture of the mortgage), his interest in the land being only contingent and liable to be defeated by payment of the money secured by the mortgage.[25] In such cases, however, an action on the case will lie by the mortgagee or his assignee against a purchaser of the equity of redemption for acts of waste (such as removing buildings, fences, timber, etc.) committed with a knowledge that the value of the security will be thereby impaired.[26] But the action in such a case is not

have been afterwards ousted. I think, therefore, that the first issue was rightly found for the plaintiff; and if so, it is clear that upon that issue he had a right to recover the amount of any damage done to the freehold by the improper removal of the fixtures in question."

In an action of tort, in Massachusetts, where a mortgage is considered a conveyance of the title, the declaration alleged that plaintiff was third mortgagee of a house; that defendant forcibly entered and removed fixtures, and that by reason thereof plaintiff's security was impaired. At the trial it appeared that at the time of the alleged tort plaintiff was out of possession, and had not the right of possession; and, there having been no breach of the condition of his mortgage, that since the alleged tort he had bought in the second mortgage, entered to foreclose and sold the property under the power of sale therein contained, buying it himself; and it did not appear that the first mortgagee, in whom the legal title was, had ever made any demand on the defendant or authorized him to resist the plaintiff's suit. *Held*, that the plaintiff could recover the full amount of the damages caused to the estate by the removal of the fixtures, without regard to the sufficiency of his security, and although the assignee in bankruptcy of the mortgagor had sued defendant for the same acts. Gooding v. Shea, 103 Mass., 360 (1869). [Byrom v. Chapin, 113 Mass., 308, 311 (1873).]

[25] Peterson v. Clark, 15 John., 205 (1818). See, also, Van Pelt v. McGraw, 4 N. Y., 112 (1850), per Pratt, J. [See Angier v. Agnew, 98 Pa. St., 587, 591 (1881).]

[26] Van Pelt v. McGraw, 4 N. Y., 110 (1850), affirming s. c., 3 Barb., 347; Robinson v. Russell, 24 Cal., 467 (1864). [Arnold v. Broad, 15 Colo. App., 389 (1900), timber; see, also, Tate v. Field, 57 N. J. Eq., 53 (1898); 57 N. J. Eq., 632 (1899); E. H. Ogden Lumber Co. v. Busse, 92 App. Div., 143 (N. Y., 1904); Edler v. Hasche, 67 Wis., 653, 661 (1887).]

[The action lies against trespassers. Jones v. Costigan, 12 Wis., 677 (1860).]

[Case in the nature of waste can be brought by a mortgagee against

based upon the assumption that the plaintiff's land has been injured,[27] but that his mortgage security has been impaired. *And his damages, therefore, will be limited to the [*397] amount of injury to the mortgage, however great the injury to the land may be. In such a case it is of no consequence whether the injury occurred before or after the forfeiture of the mort-

a stranger who has purchased from a tenant and removed machinery, etc., a portion of a mill. Patterson v. Cunliffe, 11 Phila., 564 (1875).]

See, also, Smith v. Altick, 24 Ohio St., 369 (1873); Roberts v. Dauphin Deposite Bank, 19 Pa. St., 71 (1852), where the action was by the second mortgagee; Allison v. McCune, 15 Ohio, 726 (1846), where the action was by mortgagee against an execution creditor of mortgagor levying on and removing fixtures from the mortgaged premises. See, also, the cases cited in the succeeding notes.

[The right of a mortgagee of realty to maintain an action on the case for damages done to the realty by the removal of fixtures rests upon the principle that the mortgage is a security which has been impaired, and such action can be brought by other mortgagees than the first. Where an action is brought by a second mortgagee, the rights of the earlier mortgagee can be protected by payment of the money into court, and the defendant may obtain indemnity against any subsequent suit by the earlier mortgagee, by the action of the court into which the money is paid; if actions be pending at the same time by the two mortgagees, the court can so control the litigation that no injustice will be done. Jackson *ads.* Turrell, 39 N. J. Law, 329 (1877).]

[27] In an action upon the case by the remainderman for waste by tenant for life in removing buildings, part of the realty, the measure of damages is: "How much was the inheritance injured by their destruction?" McCullough v. Irvine, 13 Pa. St., 438 (1850). See, also Hosking v. Phillips, 3 Exch., 168 (1848); Bubb v. Yelverton, L. R., 10 Eq., 465 (1870). [Lavenson v. Standard Soap Co., 80 Cal., 245, 247 (1889). See, also, E. H. Ogden Lumber Co. v. Busse, 92 App. Div., 143 (N. Y., 1904).]

[The rule adopted in some states, to consider a mortgage of land as security, rather than deeming the mortgagee as the legal owner of the fee, is approved in Jackson *ads.* Turrell, 39 N. J. Law, 329, 334 (1877), as it obviates some technical objections as well as some practical difficulties, and enables courts of law to do justice by giving to each mortgagee injured by a removal of fixtures, a remedy in damages limited to the amount of injury received, however great the injury to the land may be.]

[It is no reason to include the personalty within the lien of the mortgage, because a possible purchaser of the works would pay more for both factory and machines if they were sold at one bid than if sold separately. Knickerbocker Trust Co. v. Penn Cordage Co., 62 N. J. Eq., 624, 643 (1901).]

gage.[28] Such impairment of the security must be averred in the declaration and proved upon the trial, or the action cannot be maintained.[29] The principle of these cases is that without a fraudulent intention on the part of the defendant to injure the plaintiff, the action will not lie;[30] and it is not enough to prove that the act done was one of negligence and inattention.[31] But it is not necessary in order to sustain the action that the plaintiff should prove that the primary motive of the defendant was to cheat the plaintiff. If the defendant knew that by removing the timber, or other annexation, the value of the plaintiff's mortgage as a security would be impaired, he would be legally chargeable with a design to effect that object, though his leading motive may have been his own gain. The necessary consequence being a fraud, the actor is legally chargeable with a design to effect that result.[32] The rules above laid down apply also to the case of judgment liens and other mere securities upon land.[33]

In those states where a mortgage is considered a conveyance

[28] Van Pelt v. McGraw (*supra*), per Pratt, J.

[A mortgagee who has commenced foreclosure proceedings, and obtained a decree of sale, is, until sale under the decree, as much a lienholder as before, and entitled to maintain a suit for the impairment of his security caused by the removal of fixtures from the land between the date of the decree and of the sale. Jackson *ads.* Turrell, 39 N. J. Law, 329, 335 (1877).]

[29] Lane v. Hitchcock, 14 John., 213 (1817).

[30] Yates v. Joyce, 11 John., 136 (1814); Lane v. Hitchcock, 14 Id., 213 (1817); Gardner v. Heartt, 3 Den., 234 (1846); Van Pelt v. McGraw, 4 N. Y., 110 (1850).

[31] Gardner v. Heartt (*supra*).

[32] Van Pelt v. McGraw, 4 N. Y., 110 (1850). [Jackson *ads.* Turrell, 39 N. J. Law, 329, 331 (1877). Where the mortgage security is impaired by the removal of fixtures from the land, it is not necessary to show the insolvency of the mortgagor. The mortgagee is not bound to exhaust his personal security before resorting to the substantial security upon the strength of which he loaned his money. Moreover, to prove the debtor insolvent may be very difficult, or impossible, and lapse of time may destroy his remedy against the spoiler before the maturity of the debt when the ability of the mortgagor is to be tested. *Id.*]

[33] Yates v. Joyce, 11 John., 136 (1814).

of the title to the mortgagee, the action lies irrespective of the question whether the mortgage security is impaired or not.[34]

The action on the case in the nature of waste is inapplicable to cases where an executor claims the right to remove articles annexed to the realty by his testator, whose interest in the land is determined by his death, such an action (as we have seen) being maintainable only by one having an interest *in reversion or remainder.[35] Nor, except where the [*398] rule has been changed by statute,[36] does case in the nature of waste lie against the personal representative for waste committed by his testator or intestate during his lifetime; in such a case the action being in form *ex delicto* the maxim is applied that, *actio personalis moritur cum persona.*[37] But the executors or administrators of a tenant for years are punishable for waste done while they are in possession.[38] But where by the commission of the waste by the testator, property is acquired which benefits the testator, there an action for the value of the property will survive against the executor, as for instance, the executor will not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator from the value or sale of the trees he will.[39] The form of action, however, in such a case is not that of case in the nature of waste.[40]

Where the lessee even covenants not to do waste, the lessor has his election to bring either an action on the case in the

[34] See Gooding v. Shea, 103 Mass., 360 (1869), and Hitchman v. Walton, 4 M. & W., 409 (1838), cited (*ante*).

[35] See Page v. Davison, 22 Ill., 112 (1859); also Bacon v. Smith, cited (*supra*). See Stat. 3 & 4, W. IV., c. 42, § 2.

[36] See 1 Wash. Real Prop., 119 and notes; and consult the statutes of the several states.

[37] See Broom's Leg. Max., 909; 2 Inst., 302; 1 Cru. Dig., tit. 8, ch. 2, § 11; Vin. Abr., Waste, S 2; Bro. Abr., Waste, pl. 138.

[38] 1 Cru. Dig., tit. 8, ch. 2, § 11; 2 Inst., 302; Powell v. Reese, 7 Ad. & E., 426 (1837); Vin. Abr., Waste, S 2.

[39] See Hambly v. Trott, 1 Cowp., 376 (1776), per Lord Mansfield; Powell v. Reese, (*supra*); Dick. 215, also next note.

[40] See cases cited in next note, *supra;* Bishop of Winchester v. Knight, 1 P. Wms., 403 (1717), which was a bill in equity against the executor and heir for an account of ore dug by the testator.

nature of waste, or of covenant against the lessee for the waste done by him during the term.[41]

[*399] *II. Preventive and Equitable Remedies.

Prohibition,—Estrepement.

By the ancient remedy of writ of waste in the *tenet,* the place wasted was recovered and also treble damages. After the term was expired the writ was in the *tenuit,* and treble damages only were recoverable, the tenant no longer having the possession.[1]

Besides this remedy for waste actually done, the common law provided a preventive remedy before the waste was done by writ of prohibition issued out of chancery against those persons who were by the common law punishable for waste,

[41] Kinlyside v. Thornton, 2 W. Bl., 1111 (1776). DeGrey, C. J., "I have no difficulty upon this question. Tenant for years commits waste and delivers up the place wasted to the landlord. Had there been no deed of covenant, the action of waste, or case in nature of waste would have lain. Because the landlord by the special covenant acquires a new remedy, does he therefore lose his old?"

Blackstone, J., "Action of waste lies against tenant for years after the term is expired, only the writ must be in the *tenuit* and not in the *tenet.* 2 Roll. Abr., 830. It by no means follows, because in cases unprovided for by the Register, the Statute of Westm. 2 directs an action on the case to be framed, that the action on the case in general did not subsist at common law." See 2 Saund., 252, note 7; Burnett v. Lynch, 5 B. & C., 603 (1826); Muskett v. Hill, 7 Scott, 855, 873 (1839); s. c., 5 Bing. N. C., 694; Marker v. Kenrick, 13 C. B., 188 (1853). See, also, 18 Ves., 455; 2 Ves. & B., 349; Dick., 445.

See, however, Jones v. Hill, 1 Moore, 100 (1817), per Gibbs, C. J.: "When there is an express stipulation or contract between two parties, this species of action is not maintainable; for such contract is a total waiver of tort, and it therefore ceases to bear the character of waste." This *dictum* is not, however, found in the report of the case in 7 Taunt., 392. See, also, Herne v. Bembow, 4 Taunt., 764 (1813); Co. Lit., 54, b, note 359; 3 Brod. & Bing., 171.

[Where a tenant in writing agrees to leave gas fittings and fixtures, which are trade fixtures, but he removes them, the landlord should set out his cause of action, viz., the tort or breach of duty committed by the tenant as arising from a right which the landlord had by virtue of the specific contract, and not for a breach of a common law duty. Dunn v. Garrett, 7 N. Brunsw., 218, 222 (1851).]

[1] 2 Inst., 304; 2 Roll. Abr., 830; 2 W. Bl., 1111.

viz: tenants by the curtesy, in dower, and guardians in chivalry, which remedy Lord Coke[2] pronounced "an excellent law, for *prastat cautela quam medela,* and preventing justice excelleth punishing justice." This writ was considered by Lord Bathurst, in Goodeson v. Gallatin,[3] as the origin of the jurisdiction of the Court of Chancery to administer preventive relief by injunction.

*The common law also afforded another remedy pre- [*400] ventive in its nature by writ of *estrepement,* which is thus lucidly described by Sir William Blackstone in his learned commentaries:[4] "Estrepement is an old French word signifying the same as waste or extirpation; and the writ of *estrepement* lay at the common law, *after* judgment obtained in any action real,[5] and before possession was delivered by the sheriff; to stop any waste which the vanquished party might be tempted to commit in lands, which were determined to be no longer his. But as in some cases the demandant may be justly apprehensive, that the tenant may make waste or *estrepement* pending the suit, well knowing the weakness of his title, therefore the Statute of Glocester[6] gave another writ of *estrepement pendente placito,* commanding the sheriff firmly to inhibit the tenant '*ne faciat vastum vel estrepementum pendente placito dicto indiscusso.*'[7] And, by virtue of either of these writs the sheriff may resist them that do, or offer to do, waste; and if otherwise he cannot prevent them, he may lawfully imprison the wasters, or make a warrant to others to imprison them; or, if necessity require, he may take the *posse comitatus* to his assistance. So odious in the sight of the law is waste and destruction.[8] In suing out these two writs this difference was formerly observed; that in actions merely possessory, where no damages are recovered, a writ of *estrepement* might be had at any time *pendente*

[2] 2 Inst., 299. See, also, Jefferson v. Bishop of Durham, 1 B. & P., 104, 120 (1797), where this writ is considerably discussed by Eyre, C. J.

[3] Dick., 455 (1771).

[4] 3 Bl. Com., 225. See, also, Jefferson v. Durham (*supra*); Jones v. Whitehead, 1 Pars. Eq. Cas., 304 (1847).

[5] 2 Inst., 328.

[6] 6 Edw. I., c. 13.

[7] Register, 77.

[8] 2 Inst., 329.

lite, nay even at the time of suing out the original writ, or first process; but in an action where damages were recovered, the demandant could only have a writ of *estrepement,* if he was apprehensive of waste after verdict had;[9] for, with regard to waste done before the verdict was given, it was presumed the jury would consider that in assessing the *quantum* of damages. [*401] But *now it seems to be held, by an equitable construction of the Statute of Glocester, and in advancement of the remedy, that a writ of *estrepement,* to prevent waste, may be had in every stage, as well of such actions wherein damages are recovered, as of those wherein only possession is had of the lands; for peradventure, saith the law, the tenant may not be of ability to satisfy the demandant his full damages.[10] And therefore now, in an action of waste itself to recover the place wasted and also damages, a writ of *estrepement* will lie as well before as after judgment. For the plaintiff cannot recover damages for more waste than is contained in his original complaint; neither is he at liberty to assign or give in evidence any waste made after the suing out of the writ; it is therefore reasonable that he should have the writ of *preventive* justice, since he is in his present suit debarred of any further *remedial.*[11] If a writ of *estrepement,* forbidding waste, be directed and delivered to the tenant himself, as it may be, and he afterwards proceeds to commit waste, an action may be carried on upon the foundation of this writ; wherein the only plea of the tenant can be, *non fecit vastum contra prohibitionem:* and, if upon verdict it be found that he did, the plaintiff may recover costs and damages,[12] or the party may proceed to punish the defendant for the contempt; for, if after the writ directed and delivered to the tenant or his servants, they proceed to commit waste, the court will imprison them for this contempt of the writ.[13] But not so, if it be directed to the sheriff, for then it is incumbent upon him to prevent the *estrepement* absolutely, even by raising the *posse comitatus,* if it can be done no other way."

[9] F. N. B., 60, 61.
[10] *Ibid.,* 61.
[11] 5 Rep., 115.
[12] Moor., 100.
[13] Hob.. 85.

Injunction.

The remedies above mentioned were not usually employed at the time the above extract was written;[14] and they are now *obsolete in the most of the United States[15] as well as [*402] in England, having been superseded by the remedy of injunction to stay waste issued by courts of equity upon a bill exhibited for that purpose. For an exhaustive discussion of the cases upon this subject the reader is referred to the professed treaties upon injunctive relief, anything further than an outline of the subject and its relation to the law of fixtures being beyond the scope of this treatise.[16]

It may be stated in general terms that injunctive relief will be granted only where the threatened injury will be destructive to the inheritance or will produce irreparable injury.[17] But

[14] 3 Bl. Com., 227.

[15] See 4 Kent Com., 77 and notes. In Pennsylvania and Delaware the writ of *estrepement* has been adopted in practice. See *ante* sec. 1, p. *393, note; Jones v. Whitehead, 1 Pars. Eq., Cas. 304 (1847), where this writ is considered at considerable length by Parsons, J.

[16] See High on Inj., § 419, *et seq.*, where the origin and nature of the jurisdiction, and the cases on the subject are exhaustively considered. [Harms v. Jacobs, 158 Ill., 505, 512 (1895).]

[17] See Jerome v. Ross, 7 John. Ch., 315 (1823); Amelung v. Seekamp, 9 Gill & John., 468 (1838); Hamilton v. Ely, 4 Gill, 34 (1846); Green v. Keen, 4 Md., 98 (1853); Atkins v. Chilson, 7 Met., 398 (1844); Poindexter v. Henderson, 1 Miss. (Walk.), 176 (1824); McCay v. Wait, 51 Barb., 225 (1868); Douglass v. Wiggins, 1 John. Ch., 435 (1815). [Guernsey v. Wilson, 134 Mass., 482 (1883); Loeser v. Liebman, 14 N. Y. Supp., 569, 571 (1891); John L. Roper Lumber Co. v. Wallace, 93 N. C., 22, 30 (1885); Weiss v. Jackson County, 9 Ore., 470, 472 (1881); Bangor Slate Co. v. Shimer, 12 Pa. Dist., 777, 778 (1903); McMillan v. Ferrell, 7 W. Va., 223, 229 (1874).]

In Georges Creek Co. v. Detmold, 1 Md. Ch., 371 (1848), the rule is laid down that where there is privity of title, as between tenants for life, or years, and the reversioner, it is not necessary for the plaintiff to show irreparable injury or destruction to the estate to entitle him to the remedy by injunction. But as between strangers or parties claiming adversely there is no distinction between trespass and waste; and in both cases the injury must be shown to be irreparable, before the court will grant an injunction.

[Equity will restrain trespasses when the threatened injury is irreparable in damages. Cottle v. Harrold, 72 Ga., 830, 838 (1884).]

the mere allegation of a complainant that irremediable damage or irreparable mischief will ensue is not sufficient. To satisfy the conscience of the court, the facts must be stated, to show that the apprehension of injury is well founded.[18] And where [*403] *an adequate remedy may be had by pecuniary compensation obtainable through the medium of an action at law for damages, the injunction will be refused.[19] In order, how-

[A sheriff will be enjoined from removing an engine and boilers as personal property where to do so would necessitate tearing down brickwork and cause great injury to the freehold and unusual damages; and one is not required to depend upon obtaining relief at law at the end of litigation; and especially is this true when the property is held in trust. Jenney v. Jackson, 6 Ill. App., 32, 38 (1880).]

[18] See Amelung v. Seekamp, 9 Gill & John., 468 (1838); Hamilton v. Ely, 4 Gill, 34 (1846); Green v. Keen, 4 Md., 98 (1853); White v. Flannigain, 1 Md., 525 (1852); Carlisle v. Stevenson, 3 Md. Ch., 499 (1850); Branch Turnpike Co. v. Yuba Co., 13 Cal., 190 (1859); Waldron v. Marsh, 5 Cal., 119 (1855); Jerome v. Ross, 7 John. Ch., 315 (1823). [McCormick v. Nixon, 83 N. C., 113, 116 (1880).]

See, also, Richardson v. Ardley, 38 L. J. Chanc., 508 (1869), where the rule was laid down that, if the sheriff takes part of the fixtures belonging to the landlord on execution against the tenant, the Court of Chancery will interfere to prevent him without the mere statement of its being an irreparable damage; that the mere fact of removing the landlord's fixtures is in itself an irreparable damage, or in the nature of an irreparable damage. It is a waste which is committed upon the property and the Court of Chancery will interfere to prevent it.

[The destruction of a building or improvement permanently attached to the freehold, is *per se* a lasting injury to the inheritance as it will come to the reversioner, and will be regarded as waste. Williams v. Chicago Exhibition Co., 188 Ill., 19, 31 (1900).]

[19] Amelung v. Seekamp, 9 Gill & John., 468 (1838); Cockey v. Carroll, 4 Md. Ch., 344 (1849); Atkins v. Chilson, 7 Met., 398 (1844); Robinson v. Russell, 24 Cal., 467 (1864); Jerome v. Ross, 7 John. Ch., 315 (1823). [Rice v. Looney, 81 Ill. App., 537, 539 (1898); Bolton v. McShane, 67 Iowa, 207, 208 (1885); Frink v. Stewart, 94 N. C., 484, 486 (1886); Dunkart v. Rinehart, 87 N. C., 224, 227 (1882); Cox v. Douglas, 20 W. Va., 175, 178 (1882); Schoonover v. Bright, 24 W. Va., 698, 701 (1884).]

[The removal of a house will not be enjoined where it was erected by one believing himself to be the owner of the lot, and the land-owner has a remedy upon an appeal bond. Campbell v. Coonradt, 26 Kan., 67, 71 (1881).]

[Where an addition erected by a tenant has been separated from the main building with the intention of removing it from the landlord's premises, upon which it yet remains, an injunction will be granted to

ever, to entitle the complainant to relief by injunction, the evidence of his title must be clear, and injunctive relief will in general be refused as against a defendant in possession under an adverse title.[20] It is not necessary in order to warrant relief by injunction that actual waste shall have been already committed.[21] It is sufficient to show that there exists the intention to commit waste, or that threats thereof have been made.[22] Thus, sending a surveyor to mark out trees preparatory to cutting them, is sufficient ground for an injunction, though no waste has as yet actually been committed.[23] So, a claim by a tenant for life of a right to commit waste where no such right existed, has been held sufficient to warrant an injunction though no waste

restrain the removal from the premises; but a mandatory injunction will not issue to restore the addition as it was, as a sufficient remedy can be obtained by the recovery of damages. Fortescue v. Bowler, 55 N. J. Eq., 741, 746 (1897).]

[20] See Pillsworth v. Hopton, 6 Ves., 51 (1801); Field v. Jackson, Dick., 599 (1782); Davis v. Leo, 6 Ves., 784 (1802); Poindexter v. Henderson, 1 Miss. (Walk.), 176 (1824); Nevitt v. Gillespie, 2 Miss. (1 How.), 108 (1834); Bogey v. Shute, 4 Jones Eq., 174 (1858); Storm v. Mann, 4 John. Ch., 21 (1819). [Nethery v. Payne, 71 Ga., 374, 379 (1883).]

See, however, Earl Talbot v. Scott, 4 Kay & John., 96 (1858); Haigh v. Jaggar, 3 Colly. Ch., 231 (1845), for certain limitations upon the rule in cases of fraud, and where the waste is malicious and destructive, and irreparable by any proceedings at law. See, also, Shubrick v. Guerard, 2 Desaus. Eq., 616 and note (1808).

[Where a person seeks to enjoin the removal of a building, he must show not only his ownership of the building, but also of the lots, or, at least, a right to have it remain upon the lots, unless, possibly the defendant is a mere trespasser. Cuppy v. O'Shaughnessy, 78 Ind., 245, 248 (1881).]

[The complainant must show title to the land, and actual possession. Wearin v. Munson, 62 Iowa, 466, 467 (1883).]

[An injunction will be granted to restrain waste by the defeated party in a suit of ejectment. Winans v. Beidler, 6 Okla., 603, 607 (1898).]

[21] Gibson v. Smith, 2 Atk., 182 (1741); Coffin v. Coffin, Jac., 70 (1821). [Poertner v. Russel, 33 Wis., 193, 199 (1873).]

[22] White Water Valley Canal Co. v. Comegys, 2 Ind., 469 (1851); Loudon v. Warfield, 5 J. J., Mar., 196 (1830); Coffin v. Coffin, Jac., 71 (1821); Gibson v. Smith, 2 Atk., 182 (1741). See, also, 6 Ves., 706; Dic. 101; 1 Jac. & Walk., 653. [Dougherty v. Spencer, 23 Ill. App., 357, 359 (1887); Thatcher v. Humble, 67 Ind., 444 (1879); Butman v. James, 34 Minn., 547, 552 (1886); Poertner v. Russel, 33 Wis., 193, 199 (1873).]

[23] Jackson v. Cator, 5 Ves., 688 (1800). See, also, Coffin v. Coffin (*supra*)

had in fact been committed.[24] But where there is no claim of [*404] right to *commit acts which amount to waste, and there exists no intention of committing such acts, an injunction will not be granted on the sole ground that the tenant in possession has at a previous time committed waste.[25] Indeed, the writ of injunction being a preventive rather than a remedial writ, is inapplicable to past injuries, which being already committed are beyond the reach of a preventive writ; and where future waste is not threatened there is no ground for the issuance of the writ.[26]

In all cases in order to warrant relief by injunction on the specific ground of waste, the property in dispute must be annexed to the freehold. And where a bill for an injunction and an account alleged the commission of waste by the defendant by destroying a dove-cote, and removing the locks from the doors of the house, the chains from the lawn, the statues, images and fences from the pleasure-grounds, wardrobes, presses and closets, forming part of the wainscot of the house, Lord Chancellor Eldon in delivering his opinion observed, that the foundation of the motion to revive the injunction was, first a clear act of waste; second, another act of removing things supposed to be fixed to the freehold, wainscot, presses, etc.; that as to the dove-cote a clear act of waste was proved, and therefore against waste the injunction must be revived; but that he could not grant it against removing the presses, *eo nomine*, if not fixed to the freehold.[27] Neither in ordinary cases will an injunction be granted

[24] See Gibson v. Smith, Barnard. Ch., 497 (1741); Crockett v. Crockett, 2 Ohio St., 180, 186 (1853). See, also, Livingston v. Reynolds, 26 Wend., 115, 123 (1841).

[25] Crockett v. Crockett, 2 Ohio St., 180 (1853). See, also, Southard v. The Morris Canal, 1 N. J. Eq. (Saxt.), 518 (1832).

[26] See Southard v. The Morris Canal, 1 N. J. Eq. (Saxt.), 518 (1832); Watson v. Hunter, 5 John. Ch., 169 (1821).

[27] Kimpton v. Eve, 2 Ves. & Bea., 349 (1813).

"Note that waste was assigned in pulling down one wooden wall, also in permitting one brick wall to fall wholly down, and also in breaking up and destroying the plank floor and mangers of a certain stable, without saying 'then fixed to the soil'; and for this cause it was holden no waste. The law is the same in the said two other cases above, inasmuch as it is not expressly alleged that the walls were coped or covered, it is not waste; *Accordant* 44 E. [44 b, pl. 52], and 22 H. 6 [24 b, pl. 45]. But *quaere*

to restrain the removal of *timber already cut and sev- [*405] ered from the premises;[28] though where the mischief would be irreparable it might be necessary to interfere in this extraordinary way and prevent the removal of the timber.[29]

In some cases a court of chancery will restrain waste which at law, either by reason of the nature of the estate, or from the

what shall be intended of a stone or brick wall?'' Earl of Bedford v. Smith, Dy., 108 b (1689).

See, also, Richardson v. Ardley, 38 L. J. Chanc., 508 (1869).

Constructive annexation is sufficient. Titus v. Mabee, 25 Ill., 257 (1861); Titus v. Ginheimer, 27 Ill., 462 (1861).

[Where the removal of a house was permanently enjoined by the lower court, the appellate court held that the latter court did not have jurisdiction, as title to real estate was not involved. Bourne v. Beck, 22 Ky. Law R., 792 (1900).]

[28] Watson v. Hunter, 5 John. Ch., 169 (1821); Van Wyck v. Alliger, 6 Barb., 507 (1849). [Bank of Chenango v. Cox, 26 N. J. Eq., 452 (1875).]

See, however, anonymous case in 1 Ves. Jun., 93 (1790), where Lord Thurlow upon the Register's saying that many such orders had been made, granted an order to prevent the removal of timber unlawfully cut down.

[29] Per Kent, Ch., in Watson v. Hunter (*supra*). In this case Chancellor Kent in considering this subject said: ''This Court will stay the commission of waste or the transfer of negotiable paper, in certain cases, in order to prevent irreparable mischief; but the only mischief that can arise in the present case, as to the timber already cut and drawn to the mills of the defendants, is the possible inability of the party to respond in damages. That is a danger equally applicable to all other ordinary demands, and it is not an impending and special mischief, which will justify this extraordinary preventive remedy by injunction. If the injunction could be ordinarily applied to waste already committed, I apprehend we should very rarely hear of a special action on the case, in the nature of waste, in the courts of common law.'' Referring to the case in 1 Ves. Jr., 93, he proceeded: ''Such a case is not a sufficient authority to extend the injunction to the timber already cut. There must be a very special case made out to authorize me to go so far, and such cases may be supposed. A lease, for instance, may have been fraudulently procured by an insolvent person for the very purpose of plundering the timber under the shelter of it. Perhaps in that and like cases where the mischief would be irreparable it might be necessary to interfere in this extraordinary way, and prevent the removal of the timber. I do not mean to be understood to say that the Court will never interfere, but that it ought not to be done in ordinary cases like the present. I shall accordingly confine the injunction to the timber standing or growing at the time of the service of the process.''

estate's having been expressly granted "without impeachment of waste," is dispunishable. Thus, a tenant for life without impeachment of waste may be restrained by injunction from the wanton and malicious injury or destruction of buildings upon [*406] the demised premises.[30] So, relief may be had in *chancery to prevent waste to the injury of a contingent estate, or an executory devise even, dependent upon a legal estate.[31]

As to the parties between whom relief by injunction to restrain waste is applicable, it may be stated that in general injunctive relief is exercised only in cases where there is a privity of estate, though, as will be seen hereafter, the jurisdiction has been extended to include some cases of trespasses not founded in privity.

The most ordinary applications of this species of relief arise upon bills filed by the owner of the inheritance against tenants for life, or for years, or parties claiming under them.[32] And an injunction may be granted on a bill filed by a remain-

[30] See Packington's Case, 3 Atk., 215 (1744); Strathmore v. Bowes, 2 Bro. C. C., 88 (1786); s. c., 2 Dick., 673; 1 Cox, 263; Vane v. Bernard, 1 Salk., 161 (1714); s. c., 2 Vern., 738; Marker v. Marker, 9 Hare, 1 (1851); Aston v. Aston, 1 Ves. Sr., 264 (1749); O'Brien v. O'Brien, Amb., 107 (1751); Marquis of Downshire v. Lord Sandys, 6 Ves., 107 (1801); Lord Tamworth v. Lord Ferrers, Id., 419 (1801); Day v. Merry, 16 Id., 375 (1810); Abraham v. Budd, 2 Freem. Ch., 53 (1680); 1 Bro. C. C., 166; 2 Atk., 383; 16 Ves., 185, 1 Term, 56; Com. Dig., Chancery, D 11; Clement v. Wheeler, 25 N. H., 360 (1852). See *ante*, p. *181, note.

[31] 2 Story's Eq. Jur., § 914; Stansfield v. Habergham, 10 Ves., 278 (1804).

[Contingent remainder-men can have the life tenant enjoined from future voluntary waste. Cannon v. Barry, 59 Miss., 289, 305 (1881). So can an executory devisee. Gordon v. Lowther, 75 N. C., 193, 195 (1876). But the holder of a base fee will not be enjoined from the commission of equitable waste at the suit of an executory devisee where the contingency which will determine the fee is not reasonably certain to happen, and the waste is not wanton nor unconscientious. Gannon v. Peterson, 193 Ill., 372, 383 (1901).]

[32] See Kimpton v. Eve, 2 Ves. & Bea., 349 (1813), already cited, where an injunction against waste by a tenant was allowed; Richardson v. Ardley, 38 L. J. Chanc., 508 (1869), which was a bill filed by a landlord to restrain the sale by the sheriff of the landlord's fixtures on execution against the tenant; Dickinson v. Jones, 36 Geo., 97 (1867). See, also Titus v. Mabee, 25 Ill., 257 (1861); Titus v. Ginheimer, 27 Id., 462

(1861). [Robertson v. Meadors, 73 Ind., 43, 45 (1880); Hughes v. Burriss, 85 Mo., 660, 668; Holmes v. Standard Pub. Co., 55 Atl., 1107, 1109 (N. J. Ch., 1903); Miller v. Gray, 29 Tex. Civ. App., 183 (1902); Poertner v. Russell, 33 Wis., 193, 199 (1873); see, also, Agnew v. Whitney, 10 Phila., 77 (1873); Allan v. Rowe, 1 N. B. Eq. (Trueman), 41, 52 (1894).]

[The removal of a building by the tenant's assignee is waste, and may be restrained by injunction. Gray v. McLennan, 3 Man., 337, 342 (1886).]

[A landowner in possession can enjoin a purchaser of a former tenant's interest in fixtures from removing such fixtures, whether they be real or personal property, where it is not shown that the title or right of possession was in the tenant at the time of the purchase. Nolan v. Rotsler, 135 Cal., 264, 266 (1901).]

[Where the lessor enjoins the lessee from removing fixtures pending an appeal, and intends to appropriate the property in dispute, an injunction to prevent the lessor from interfering with the fixtures pending such appeal is properly granted. Baker v. National Biscuit Co., 96 Ill. App., 228, 229 (1901).]

[A lessee for ninety-nine years, with a covenant for perpetual renewal, will be enjoined from tearing down a building if the reversioner's security for rent reserved would be greatly and irreparably impaired. Crowe v. Wilson, 65 Md., 479 (1886).]

[If a mechanics' lien upon a building erected by a tenant be foreclosed, and the landlord, by acquiring the certificate of purchase, acquires title to the building, he is entitled to an injunction against its removal; but he must declare as a lien-holder, and not as owner. Cuppy v. O'Shaughnessy, 78 Ind., 245, 249 (1881).]

[A lessee will be restrained from cutting and removing timber, even though no irreparable injury be shown, where, by the terms of his lease, he is restricted to a particular use of the premises. Frank v. Brunnemann, 8 W. Va., 462, 471 (1875).]

In Hooper v. Broderick, 9 L. J., Ch. (N. S.), 321 (1840), upon a question as to the legal right of a tenant to remove fixtures, upon a motion to dissolve an injunction, the V. C. expressed the opinion that the motion should stand over until the plaintiffs had been permitted to inspect and make a list of the articles proposed to be removed; and then in order to try the legal right to do so, that the plaintiffs should bring an action against the defendant in which the defendant should admit that he had removed the things in dispute.

However, in Pugh v. Arton, L. R., 8 Eq., 626 (1869), the right of a tenant to remove fixtures was passed upon by Malins, V. C., upon a bill to enjoin such removal filed by the landlord, without recourse to a court of law to determine the legal right. See, also, Lawton v. Lawton; Dudley v. Warde; Quincy, *Ex parte*, cited in a preceding part of the work, and also *post*, where questions as to the right to fixtures between various parties arose and were determined in equity.

[*407] *derman for life[1] as well as one filed by remainderman in fee; and this notwithstanding there is an intervening estate for life.[2] But an injunction will not be granted at the suit of the landlord against the tenant or his assigns to restrain the commission of waste by the removal from the demised premises of a building erected by the tenant, where it appears that the landlord is not entitled to the reversion.[3] An injunction may be issued to restrain a tenant from year to year from removing the crops, manure, etc., contrary to the custom of the country.[4] So, a ground landlord may enjoin the commission of waste by an under lessee.[5]

The remedy by injunction to restrain waste is not precluded by the fact that the lease contains a covenant by the lessee to repair the premises and leave in repair at the end of the term, etc.;[6] nor by a covenant not to injure, cut down, take, destroy or carry away, etc., any more wood or timber than shall actually be used on the premises, and not to make or suffer to be made

[1] Perrot v. Perrot, Atk., 94 (1744); Davis v. Leo, 6 Ves., 787 (1802); Garth v. Cotton, 1 Dick., 183, 205, 208 (1753); Birch-Wolfe v. Birch, L. R., 9 Eq., 683 (1870).

Contra, Mayo v. Feaster, 2 McCord Ch., 137 (1827).

[2] Perrot v. Perrot, 3 Atk., 94 (1744); Robinson v. Litton, Id., 209 (1744); Davis v. Leo, 6 Ves., 787 (1802); Garth v. Cotton, 1 Dick., 183, 205, 208 (1753); s. c., 1 Ves. Sr., 555; 3 Atk., 751; Abraham v. Bubb, 2 Freem. Ch., 53 (1680); Dennett x. Dennett, 43 N. H., 499 (1862); Com. Dig., Waste, C 3; 1 Eq. Ca. Abr., 400; 3 P. Wms., 268; Amb., 105; 3 Atk., 723; 2 Story's Eq. Jur., § 913.

[3] Perrine v. Marsden, 34 Cal., 14 (1867).

[4] Brett v. Brett, 2 Madd., 62 (1817); Pultney v. Shelton, 5 Ves., 147 (1799); Onslow v. ————, 16 Id., 173 (1809). See, also, Lewis v. Christian, 40 Geo., 187 (1869).

[A tenant may be enjoined by his landlord from removing manure. Bonnell v. Allen, 53 Ind., 130, 134 (1876).]

[An injunction will not be granted at the suit of the landlord to restrain a tenant from cutting a matured crop, upon the ground that it would be an injury to the freehold. Perry v. Hamilton, 138 Ind., 271 (1894).]

[5] Farrant v. Lovel, 3 Atk., 723 (1750), s. c., *nom*, Farrant v. Lee, Amb. 105.

[6] See Sunderland v. Newton, 3 Sim., 450 (1830); Kimpton v. Eve, 2 Ves. and Bea., 349 (1813); Richardson v. Ardley, 38 L. J. Chanc., 508 (1869).

[A tenant will be enjoined from tearing down a building, with the intention of erecting another, although his lease authorizes alterations. Davenport v. Magoon, 13 Orc., 3 (1884).]

any manner of waste, sale or destruction in the wood or timber on the premises.[7]

The value of the fixtures should not be assessed as damages upon the dissolution, after the expiration of the term, of an injunction issued before such expiration prohibiting the removal *of fixtures by the tenant, the injunction not changing [*408] the title to the property nor making the party suing it out liable for a conversion.[8] But where in such a case after such expiration the landlord being in possession of the premises, by warranty deed sold and conveyed the premises, buildings as well as land, to a *bona fide* purchaser for a valuable consideration, and applied the proceeds to his own use, such buildings being as between landlord and the tenant the property of the tenant, though passing by such deed to the purchaser, it was held that this was a conversion and entitled the lessee to compensation in damages; and in assessing the damages on the dissolution of such injunction the value of the buildings for purposes of removal was properly included.[9]

The remedy by injunction to restrain the commission of waste is also in some cases applicable to the relation existing between the mortgagee and the mortgagor in possession, the latter of whom will be restrained by injunction from severing and removing fixtures, timber, etc., constituting a part of the mortgage security, to such an extent as to diminish the value of the property and thereby render the mortgage security inadequate.[10] The authorities certainly go to the extent above

[7] Livingston v. Reynolds, 26 Wend., 115 (1841).

[8] Bircher v. Parker, 40 Mo., 118 (1867). [See, *ante*, p. *141. Poertner v. Russel, 33 Wis., 193, 203 (1873).]

[A tenant guilty of contempt of court by removing fixtures in violation of an injunction, must not only restore the same, but must meet any expenditure required to remedy the injuries thereto. Ashby v. Ashby, 62 N. J. Eq., 618, 622 (1901).]

[9] Bircher v. Parker, 43 Mo., 443 (1869). The warranty deed from the landlord to the purchaser was held to have been properly read in evidence as tending to show a conversion, and was sufficient for that purpose. *Ib.*

[10] See Robinson v. Preswick, 3 Edw. Ch., 246 (1838); Capner v. Fleming Mining Co., 3 N. J. Eq., 467 (1836); Brown v. Stewart, 1 Md. Ch., 87, 93 (1847); Maryland v. Northern, etc., Rwy. Co., 18 Md., 193 (1861); Gray v. Baldwin, 8 Blackf., 164 (1846); Bunker v. Locke, 15 Wis., 635 (1862); Ensign v. Colburn, 11 Paige, 503 (1845); Robinson v. Russell, 24 Cal., 467

[*409] *stated, and some of them, and especially those where the mortgagee is considered the owner of the fee, go further and state the doctrine without the limitation as to impairing and rendering insufficient the mortgage security, to be, that the mortgagor in possession will be restrained by injunction from removing fixtures, etc., constituting a part of the mortgage security, or otherwise committing waste upon the mortgaged premises.[11] The mortgagor in possession may, however, according to the weight of authority (at least in those States where a mortgage is considered a mere security), exercise all

(1864); Ackroyd v. Mitchell, 3 L. T. (N. S.), 236 (1860); King v. Smith, 2 Hare, 239, 244 (1843), where Wigram, V. C., in defining the terms "sufficient security," said: "I think the question which must be tried is whether the property the mortgagee takes as a security is sufficient in this sense:—that the security is worth so much more than the money advanced, that the act of cutting timber is not to be considered as substantially impairing the value, which was the basis of the contract between the parties at the time it was entered into."

See, also, Camp v. Bates, 11 Conn., 51 (1835); Webb v. Boyle, 63 N. C., 271 (1869); Witmer's Appeal, 45 Penn. St., 455 (1863), which was an injunction bill by prior judgment creditors whose judgments were a lien upon the land, to restrain the sale by subsequent judgment creditors of fixtures (parts of the engine and other machinery of a grist and saw-mill), which had been severed by the judgment debtor for the purpose of converting them into personalty and enabling such subsequent creditors to levy thereon and sell in satisfaction of their claims. Such sale was restrained by the court, upon the ground that such severance was a fraud upon the complainants, the real estate upon which their judgments were liens being conceded to be insufficient for their security. [See Penn Mut. L. Ins. Co. v. Semple, 38 N. J. Eq., 314 (1884), as between a mortgagee and a judgment creditor.]

[Mutual Life Ins. Co. v. Bigler, 79 N. Y., 568 (1880), modifying Mutual Life Ins. Co. v. National Bank of Newburgh, 25 Supr. Ct. (18 Hun), 371, 372 (1879); Starks v. Redfield, 52 Wis., 349, 354 (1881); Taylor v. Collins, 51 Wis., 123, 127 (1881); Scott v. Webster, 50 Wis., 53 (1880); see, also, Cahn v. Hewsey, 29 N. Y. Supp., 1107 (1894); Kimball v. Darling, 32 Wis., 675, 687 (1871); Robinson v. Cook, 6 Ont., 590, 598 (1884).]

[Under the statute a mortgagee can enjoin the removal of a building if an adequate remedy can not be afforded by an action of damages. State Sav. Bank v. Kercheval, 65 Mo., 682, 688 (1877).]

[11] See Nelson v. Pinegar, 30 Ill., 473 (1863); State v. Northern, etc., Rwy. Co. (*supra*); Salmon v. Clagett, 3 Bland Ch., 180 (1830). [Williams v. Chicago Exhibition Co., 188 Ill., 19, 30 (1900); Minneapolis Trust Co. v. Verhulst, 74 Ill. App., 350, 355 (1897).]

such acts of ownership upon the premises (even to the extent of committing acts ordinarily amounting to waste), as do not impair and render inadequate the mortgage security, without rendering himself subject to be restrained by injunction;[12] though in those States where the mortgage is considered a conveyance of the land an action at law may lie in respect of the things severed. In those States where the mortgagee is considered the owner of the fee, and the doctrine is stated generally that the mortgagee is entitled to an injunction to prevent waste being committed upon the mortgaged premises, the grounds of the interference are stated to be that the mortgagee is entitled to his whole security unimpaired during the existence of his *mortgage;[13] and that, as between the parties to the [*410]

See, also, Titus v. Mabee, 25 Ill., 257 (1861); Titus v. Ginheimer, 27 Id., 462 (1861), where the sheriff was restrained at the suit of trustees of the bondholders from selling fixtures on execution against the owner of the land.

[12] Kekewich v. Marker, 3 Mac. & G., 311, 329 (1851); King v. Smith, 2 Hare, 239, 243 (1843); Perrine v. Marsden, 34 Cal., 14 (1867); Buckout v. Swift, 27 Cal., 433 (1865); Robinson v. Russell, 24 Cal., 467 (1864); Cooper v. Davis, 15 Conn., 556, 561 (1843). See *ante*, p. *48. [Williams v. Chicago Exhibition Co., 86 Ill. App., 167 (1899).]

[Where the mortgagor is not alleged to be insolvent, and the loan is nine thousand dollars secured by property worth forty thousand dollars, the mortgagee is not entitled to an injunction to restrain the removal of fixtures worth two thousand dollars. Andrews v. Chandler, 27 Ill. App., 103, 110 (1887).]

[While a court of equity will interfere by injunction to restrain waste by a mortgagor in possession, the waste must be injury to the freehold which will impair the security of the mortgagee. The removal of half decayed rails, and the scattered plank of a stable which has fallen from its own decay, is not waste. Coker v. Whitlock, 54 Ala., 180, 183 (1875).]

[Where machinery is attached by the buyer to his plantation, and the seller has a right to have such machinery sold to satisfy his claim, the mortgagee of the plantation will be enjoined from selling such machinery. Walburn-Swenson Co. v. Darrell, 49 La. Ann., 1044, 1046 (1897).]

[13] Nelson v. Pinegar, 30 Ill., 473 (1863); State v. Northern, etc., Rwy. Co., 18 Md., 193 (1861); Robinson v. Litton, 3 Atk., 210 (1744).

[After foreclosure and sale, the mortgagor will be enjoined from cutting and removing trees valuable for lumber, which constitute the chief value of the land. Malone v. Marriott, 64 Ala., 486, 492 (1879).]

[Either a senior or junior mortgagee has the right, by injunction, to arrest the commission of waste by the mortgagor in possession. Coleman v. Smith, 55 Ala., 368, 378 (1876).]

mortgage the mortgagee is considered in equity as the owner of the fee and as such entitled to all the rights and remedies which the law gives to such an owner.[14] The principle upon which relief is granted in those States where a mortgage is considered only a security, is that of preventing the destruction of such security.[15]

Injunction is also a proper remedy in certain cases as between the vendor and vendee of real estate. Thus it has been held to be a proper remedy in behalf of the vendee in possession to prevent the removal by the vendor of fruit trees in a nursery and ornamental shrubbery claimed by the vendor by virtue of a parol reservation from the deed.[16] But a vendee of land in possession under his contract for the purchase thereof will not be enjoined from cutting timber thereon, unless the cutting is continued to such a degree as to render the land inadequate as a security for the payment of the unpaid purchase money.[17]

So, an injunction bill may be maintained by a prior judgment creditor whose judgment is a lien upon the land against subsequent judgment creditors, to restrain the sale by them of fixtures severed by the judgment debtor for the purpose of

[14] Nelson v. Pinegar (*supra*).

[15] See Cooper v. Davis, 15 Conn., 556, 561 (1843); Nelson v. Pinegar, 30 Ill., 473, 481 (1863); Brady v. Waldron, 2 John. Ch., 148 (1816).

And the principle is the same in the case of an injunction bill by an attaching creditor who has levied his attachment upon the land of the debtor. Camp v. Bates, 11 Conn., 51, 57 (1835).

[In Williams v. Chicago Exhibition Co., 188 Ill., 19, 32 (1900), the court did not pass upon the point whether, to entitle a mortgagee to an injunction against waste, it must be such as renders the security inadequate or insufficient, saying that some cases seem to treat "inadequate" and "impaired" as convertible terms, and holding that the allegations in the bill of irreparable injury, that interests would be unduly prejudiced, etc., implied that by the removal of the buildings and machinery the security would be insufficient.]

[16] Smith v. Price, 39 Ill., 28 (1865).

[The vendee can not be restrained from removing houses erected by him, which he was under no duty to erect, as long as he complies with his contract, and is in possession, and it is not shown that the vendor's security is impaired. Miller v. Waddingham, 91 Cal., 377, 382 (1891).]

[17] Van Wyck v. Alliger, 6 Barb., 507 (1849); Scott v. Wharton, 2 Hen. & Mun., 25 (1808). [Core v. Bell, 20 W. Va., 169 (1882).]

converting them into personalty and enabling such subsequent creditors to levy thereon and sell in satisfaction of their claims, on the ground that such severance is a fraud upon the complainant, the real estate upon which his judgment is a lien being conceded to be insufficient for his security.[18]

*An injunction is also an appropriate remedy at the [*411] suit of a patron to restrain waste by a rector or vicar in possession of an ecclesiastical benefice.[19]

As an incident to the relief by injunction against future waste, a court of equity will, in all cases where an injunction is granted to restrain such future waste, grant an account and decree satisfaction for the waste, if any, already done.[20] But where an injunction is not granted, neither, in general, will an account be ordered of the waste already committed, the maxim being "no injunction, no account."[21] In Winship v. Pitts,[22] the rule was laid down by Walworth, Ch., that a court of chancery only interferes to prevent *future* waste, except in cases where the complainant has no remedy at law, or a discovery is necessary, or where there is some other ground for equitable interference. In ordinary cases the account for

[18] Witmer's Appeal, 45 Penn. St., 455 (1863).

See, also, Camp v. Bates, 11 Conn., 51 (1835), the case of an attachment levied upon land; Webb v. Boyle, 63 N. C., 271 (1869).

[An injunction against cutting timber will not be continued where, if removed, the property will still be valuable enough to secure creditors. Portland Bldg. Ass'n v. Creamer, 34 N. J. Eq., 107, 110 (1881).]

[19] Sowerby v. Fryer, L. R., 8 Eq., 417 (1869); 2 Atk., 217; Barnard, 399; Amb., 176; 1 Bos. & Pul., 119. See, also, 2 Bro. C. C., 552; 3 Mer., 427.

[20] Jesus College v. Bloom, 3 Atk., 262 (1745); Ackerman v. Hartley, 8 N. J. Eq., 476 (1850); Porch v. Fries, 18 N. J. Eq., 204 (1867); Dennett v. Dennett, 43 N. H., 499, 503 (1862); Livingston v. Reynolds, 26 Wend., 115, 123 (1841). [Powell v. Cheshire, 70 Ga., 357, 360 (1883); Bonnell v. Allen, 53 Ind., 130, 134 (1876); Weatherby v. Wood, 29 How. Pr., 404, 407 (N. Y., 1865); Brown v. Sage, 11 Gr. Ch., 239 (Ont., 1865).]

[Although one having a contingent interest can have waste by a life tenant enjoined, he can not recover damages for that already committed. Gordon v. Lowther, 75 N. C., 193, 195 (1876).]

[21] Crockett v. Crockett, 2 Ohio St., 180, 186 (1853); Parrott v. Palmer, 3 Myl. & K., 632, 640, 642 (1834); Garth v. Cotton, 1 Ves. Sr., 528 (1750).

[22] 3 Paige, 261 (1832). [See Ewing v. Rourke, 14 Ore., 514 (1887).]

waste already committed is merely incidental to the relief by injunction against future waste and is directed upon the principle of preventing a needless multiplication of suits. But where there is some distinct ground for equitable interference as to the waste already done, as where such waste is of such a character that the complainant has no remedy at law and by the denial of an account would receive great injury, it will be ordered, though no injunction is allowed.[23]

[*412] *But on a bill simply to restrain waste by the removal of fixtures, and not for a sale or to foreclose the mortgage, the mortgage debt not being due, a receiver will not be appointed, an injunction being an adequate and appropriate remedy.[24]

As has been before remarked, injunctive relief in restraint of waste is generally exercised in cases where there is privity of title, and it was originally confined to cases founded upon such privity. But the jurisdiction has been gradually enlarged; and now it is well settled that to prevent irreparable mischiefs, or to suppress multiplicity of suits and oppressive litigation, a court of equity will interfere in cases of trespasses where there is no privity. But if the trespass be merely fugitive and temporary, and one for which adequate compensation can be had at law, equity will not interfere.[25]

Questions respecting fixtures may also arise for determination in courts of equity in a variety of other ways.

[23] Parrott v. Palmer, 3 Myl. & K., 632 (1834); Garth v. Cotton, 3 Atk., 751 (1753); s. c., 1 Ves. Sr., 524, 546.

Mines and collieries constitute an exception to the general rule on the ground that working them is a kind of trade, and as to them an account is granted even in cases where no injunction would lie. Story v. Windsor, 2 Atk., 630 (1743); Winchester v. Knight, 1 P. Wms., 406 (1717); Pulteney v. Warren, 6 Ves., 73, 89 (1801); Parrott v. Palmer, 3 Myl. & K., 632, 642 (1834).

As to the allowance of an account against the assets of one deceased in cases of equitable waste where an injunction is inapplicable, see Morris v. Morris, 3 DeG. & J., 323 (1858); Lansdowne v. Lansdowne, 1 Madd., 116 (1815).

[24] Robinson v. Preswick, 3 Edw. Ch., 246 (1838). [See Collins v. Richart, 77 Ky., 621, 623 (1879).]

[25] See Jerome v. Ross, 7 John. Ch., 315 (1823); 2 Story's Eq. Jur, §§ 918, 928, *et seq.;* High on Inj., § 458, *et seq.*, where the cases are exhaustively collected and considered. A further consideration of the subject here would be beyond the scope of this work.

In Lawton v. Lawton,[26] the question arose as to the right to fixtures as between the executor of a tenant for life and the remainderman, upon a bill filed by a creditor of the tenant for life to have a certain fire-engine set up for the benefit of a colliery by the tenant for life considered as personal estate and applied to the increase of assets for the payment of debts. In Dudley v. Warde,[27] also, the bill was filed by the executor of a tenant for life or in tail against the remainderman to have four similar engines delivered up as the personal estate of his testator.

In Franks v. Cravens,[28] an engine, boiler and other machin-*ery of a saw-mill situated on land covered by a deed [*413] of trust to secure a debt to A., were severed and removed to another tract of land several miles distant, and while there a deed of trust was executed upon them as personalty to secure a debt to another creditor and they were subsequently sold and passed into the possession of other parties. On a bill filed by the *cestui que trust* in the first deed against the purchasers, who had been in possession of the property for several years, alleging notice of plaintiff's lien on the mill, engine, etc., and that defendants were endeavoring to delay and hinder the plaintiff in the collection of his debt, and praying that the engine, etc., might be surrendered to a trustee to be appointed by the court in the place of the former trustee who had left the State, on the ground of notice of the plaintiff's prior lien, and that the said purchasers had only an equitable title cognizable in a court of equity, it was held, that, as there was nothing to have prevented the plaintiff or his trustee from pursuing and reclaiming the property by an action of trover or detinue in whosesoever possession it was found, there was a complete remedy at law, and therefore equity would not interfere.

[26] 3 Atk., 13 (1743).

[27] Ambl., 113 (1751).

[Where defendants in ejectment stand upon an agreement that buildings should remain their property, and do not dispute title to the land, and make no claim for the value of the improvements, a court of equity has jurisdiction to allow the removal of such improvements. Deeell v. McRee, 35 So., 940 (Miss., 1904).]

[28] 6 W. Va., 185 (1873).

In Smith v. Altick,[29] however, on a petition filed to foreclose a mortgage given to the vendor in pursuance of a contract for the sale by him of a "distillery with all the machinery, fixtures, etc., thereto belonging or appertaining," and to compel the purchasers of fixtures severed and removed from the distillery by the vendee while in possession under the contract, and sold to such purchasers both before and after the execution of such mortgage (the premises having substantially the same description in the contract and the deed and mortgage executed in pursuance thereof, and such purchasers having notice of the plaintiff's rights under the contract and under the mortgage) to pay the value thereof into court, etc., it was held, that such purchasers being chargeable with notice of the rights of the vendor who had been guilty of no laches, were liable for the value of such fixtures to make up any loss to the vendor on [*414] *account of the diminution in value of the premises by reason of their removal, the vendor's rights in this respect being considered as perfect as that of a mortgagee whose mortgage had been recorded; that the vendor after default in his mortgage might join such purchasers and the mortgagor in one action to foreclose his mortgage, sell the mortgaged premises, and, in the event of their being insufficient, subject the value of the fixtures so purchased to make up the deficiency or loss to the mortgagee, such purchasers being liable in the inverse order of time in which the purchases were made.

In cases like that last cited where the removal of the fixtures renders the mortgage security inadequate, the purchaser of the fixtures having notice of the rights of the vendor or mortgagee, there would seem to be no obstacle to a complete remedy at law whether such mortgage is considered as a con-

[29] 24 Ohio St., 369 (1873). [Tate v. Field, 56 N. J. Eq., 35 (1897); see, also, Mercantile Trust Co. v. Chicago, P. & St. L. R'y Co., 123 Fed., 393 (U. S. C. C. A., Ill., 1903).]

[If a house is removed from mortgaged premises, the lien of the mortgage follows, and the house may be sold if there be a deficiency. Dakota Loan Co. v. Parmalee, 5 S. D., 341 (1894).]

[See Betz v. Muench, 13 Atl., 622 (N. J., 1888), as to the right of a mortgagee against a purchaser, with notice, of a house removed by the mortgagor.]

veyance of the title or not;[30] and in States where the distinction in form between legal and equitable remedies is kept up, the doctrine of Franks v. Cravens is probably more in accordance with principle. The two cases, may, however, probably be distinguished on this ground.[31]

[30] See section 1, *ante*.

[31] See further, on the subject of equitable remedies, Bennett v. Nichols, 12 Mich., 22 (1863). In this case the complainant's intestate had been leased premises for the purpose of erecting a steam saw-mill thereon (the lease running to himself, his executors, administrators and assigns forever, reserving no rent but conditioned to erect and maintain a saw-mill), had placed thereon a frame for the building ready for erection, but which except as to a small amount of material had not been put up before his death, and he had contracted and partly paid for an engine for the same. After his death the land was sold by his lessor, and the purchaser together with the contractor for the engine, put up the frame, completed and commenced operating the mill. Complainant as his administrator filed his bill against them to compel the payment of the value of the mill frame, and of moneys paid toward the engine and to have the amount declared a lien upon the premises. *Held*, that his claims were not of equitable jurisdiction, and that his remedy was at law. [See Fisher v. Patterson, 99 Ill. App., 70 (1900), aff'd 197 Ill., 414 (1902); Hamlin v. Parsons, 12 Minn., 108; Seibel v. Siemon, 52 Mo., 363, 370 (1873); Betz v. Muench, 13 Atl., 622 (N. J., 1888); Edler v. Hasche, 67 Wis., 653, 661 (1887); and, *ante*, p. *47.]

[Where a building is removed from mortgaged lots by the mortgagor, the mortgage remains a lien upon the building as between a subsequent assignee of the mortgage and one who has, by quitclaim deed and without notice, acquired the lot upon which such building has been moved. Partridge v. Hemenway, 89 Mich., 454 (1891).]

[Where a dwelling-house was removed from mortgaged land to another lot, and the latter lot sold to one without notice, the equities of the grantee and of the mortgagee are equal, and the mortgagee's only remedy is at law. Verner v. Betz., 46 N. J. Eq., 256 (1889).]

[A mortgagee can not pursue property, when sold by the owner, after it is annexed to and forms part of real estate. Harris v. Bannon, 78 Ky., 568, 570 (1880). In this case cottages had to be removed to make way for a railroad station, and there was no evidence that the security had been impaired.]

[Where, between the time of a foreclosure sale of a house and lot, and the expiration of the equity of redemption, the house is stolen and annexed to an adjacent lot, whatever right to an equitable lien the purchaser at the foreclosure sale might have had upon the property to which the house was removed, will be lost by a delay during which such property is acquired by an innocent purchaser. Fisher v. Patterson, 197 Ill., 414, 417 (1902), aff'g 99 Ill. App., 70 (1900).]

III. Replevin.

It is well settled that, if fixtures, timber trees, etc., constituting during their annexation to the soil a part of the realty, are tortiously severed therefrom and removed by a wrong-doer, or by a tenant without the consent of the owner of the fee, they become, at the option of the owner of the soil, personal property; and may as such be recovered by him in an action [*415] *of replevin.[1] In those States where a mortgage is considered a conveyance of the fee, the same rule applies, as be-

[While the removal of a building can be enjoined by the mortgagee if his security would thereby be rendered insufficient, regardless of the responsibility of the mortgagor; yet, if such removal has been made, and the mortgagee, in ignorance thereof, accepts a deed of the premises from the mortgagor in full payment of the indebtedness secured, he has no remedy. Triplett v. Parmlee, 16 Neb., 649, 650 (1884).]

[1] Christian v. Dripps, 28 Penn. St., 278 (1857); Harlan v. Harlan, 15 Penn. St., 507 (1850); Snyder v. Vaux, 2 Rawle, 423 (1830); Cresson v. Stout, 17 John., 116 (1819); Congregational Soc'y of Dubuque v. Fleming, 11 Iowa, 533 (1861); Laflin v. Griffiths, 35 Barb., 58 (1860); Ogden v. Stock, 34 Ill., 522 (1864); Sands v. Pfeiffer, 10 Cal., 258 (1858); Richardson v. York, 14 Me., 74 (1837). See, also, Heaton v. Findlay, 12 Penn. St., 307 (1849). [United States v. Cook, 86 U. S., 591 (1873); McGinnis v. Fernandes, 32 Ill. App., 424 (1889), aff'd 135 Ill., 69 (1890); Moore v. Combs, 24 Ind. App., 464 (1899); Cent. Br. R. R. Co. v. Fritz, 20 Kan., 430, 438 (1878); Green v. Chicago, R. I. & P. R. R. Co., 8 Kan. App., 611, 614 (1899); Strubbee v. Cincinnati R'y, 78 Ky., 481, 484 (1880); Luce v. Ames, 84 Me., 133, 134 (1891); United States v. Steenerson, 50 Fed., 504 (U. S. C. C. A., Minn., 1892); Mine LaMotte Co. v. White, 80 S. W., 356, 360 (Mo. App., 1904); Tudor Iron Works v. Hitt, 49 Mo. App., 472, 479 (1892); Kirch v. Davies, 55 Wis., 287, 294 (1882); see, also, Sawyer v. Middleborough Co., 13 Ky. Law R., 550 (1891); Nelson v. Graff, 12 Fed., 389 (U. S. C. C., Mich., 1882); Merrill v. Dixon, 15 Nev., 401, 404 (1880); Jones v. Bull, 90 Tex., 187, 192 (1896).]

They may also as a matter of course be retaken by the owner or his agent without process, by seizure and forcing them from such wrong-doer, using no more violence than is necessary for that purpose. State v. Elliot, 11 N. H., 540 (1841).

[Detinue may also be maintained. Cooper v. Watson, 73 Ala., 252, 254 (1882).]

[A grantor, who is given the right to occupy the premises for a certain time, is the tenant of the grantee; and articles, which are a part of the realty, are let for use on the premises during the term. If wrongfully separated by the tenant they become the personal property of the landlord,

tween the mortgagee and the mortgagor, or parties claiming under him, severing and removing fixtures from the mortgaged premises without the consent of the mortgagee.[2] And since a sheriff's deed on the sale of mortgaged premises takes effect by relation at the date of the mortgage, it is held to pass fixtures annexed subsequently to the execution of the mortgage; and such fixtures if wrongfully severed by the mortgagor prior to the execution of such deed may be recovered in replevin by the purchaser at the foreclosure who subsequently obtains a sheriff's deed of the premises.[3] The rule first above stated applies irre-

and all right of the wrong-doer therein ceases, and the landlord can bring replevin at once. Leonard v. Stickney, 131 Mass., 541, 545 (1881).]

[A vendor of real estate under contract, the vendee being in default, can not maintain replevin for a house built by the vendee and afterwards removed from the land, until he has taken such steps as will entitle him to possession of the land. Ellsworth v. McDowell, 44 Neb., 707, 713 (1895).]

[Where railroad iron was sold under an execution upon a void judgment, and bought by the owner of the land to which it was attached, who removed it, and placed it in piles, and claimed ownership for two years, he is protected by the statute of limitations. Carter v. Pratt, 23 Kan., 613, 617 (1880).]

[2] See *ante*, p. *47, and note; also Cresson v. Stout, 17 John., 116 (1819), replevin by mortgagee in possession as against a subsequent levy by an execution creditor. [Jones v. Ramsey, 3 Ill. App., 303, 310 (1878); see Scottish Am. Co. v. Sexton, 26 Ont., 77, 79 (1894).]

[A mortgagor, without the knowledge of the mortgagee, moved a house from the mortgaged lot to another lot owned by the former, and subsequently sold the house to the party whom the mortgagor had originally employed to move it. The latter proceeded to move it to a lot of his own; and, while it was detached, the mortgagee replevied it. *Held*, that the mortgagee could recover the house, as his title had not been extinguished; and the purchaser could not claim to be innocent, and the house was personal property while severed. Dorr v. Dudderar, 88 Ill., 107, 109 (1878).]

[Where the mortgagee has an order from the mortgagor to cut the hay upon the mortgaged premises, and apply the proceeds upon the mortgage note, he can maintain replevin for grass cut and carried away by a stranger, even though he might recover full compensation in a pending suit for trespass. Burley v. Pike, 62 N. H., 495, 497 (1883).]

[3] Sands v. Pfeiffer, 10 Cal., 258 (1858). See, also, Laflin v. Griffiths, 35 Barb., 58 (1860).

[But a purchaser of land at foreclosure sale can not, before the period of redemption has expired, bring replevin for a house removed from such land after the sale, as he has not the right to immediate possession. People's Sav. Bank v. Jones, 114 Cal., 422 (1896).]

spective of the physical character of the thing so severed and removed; thus, houses so severed and removed are properly subjects of replevin, though a house is *prima facie* a parcel of the realty.[4] And the action lies so long as the house or other article can be identified and is not permanently annexed to and made a [*416] part *of other realty.[5] It is no cause of demurrer to a

[Execution purchasers can maintain replevin for timber severed between the date of sale and the delivery of the sheriff's deed. So held in Michigan. Marquette, H. & O. R. R. Co. v. Atkinson, 44 Mich., 166, 168 (1880).]

[4] Ogden v. Stock, 34 Ill., 522 (1864); Huebschmann v. McHenry, 29 Wis., 655 (1872). See, also, Mills v. Redick, 1 Neb., 437 (1871). [Dorr v. Dudderar, 88 Ill., 107, 108 (1878); Matzon v. Griffin, 78 Ill., 477, 478 (1875); Bridges v. Thomas, 8 Okla., 620, 621 (1899); see, also, Cutter v. Wait, 131 Mich., 508, 509 (1902).]

[Where a trespasser has begun to remove a building, replevin can be maintained therefor by the land-owner, although it lies about one-fourth upon the plaintiff's land. Luce v. Ames, 84 Me., 133, 134 (1891).]

[5] Ogden v. Stock, 34 Ill., 522 (1864); Davis v. Easley, 13 Ill., 192 (1851); Huebschmann v. McHenry, 29 Wis., 655 (1872). [Richards v. Morey, 133 Cal., 437 (1901); Dorr v. Dudderar, 88 Ill., 107, 108 (1878); Hacker v. Munroe, 176 Ill., 384 (1898); Fifield v. Farmers' Nat. Bank, 148 Ill., 163, 173 (1893); Ricketts v. Dorrel, 55 Ind., 470 (1876); Gill v. DeArmant, 90 Mich., 425, 430 (1892); McDaniel v. Lipp, 41 Neb., 713, 716 (1894); see, also, Scottish Am. Co. v. Seston, 26 Ont., 77, 79 (1894).]

[A contract for the purchase of land was entered into, which provided for the erection of a dwelling-house by the grantee which was to remain upon the premises. A house, sixteen by twenty-four, resting upon ten blocks of wood, was built; but, after default in payment upon the contract, was moved into the highway, and sold to an assignee of the contract, who moved it to a tract of his, and placed it upon a stone foundation which was thereon, intending to convert it into real estate, but which could easily be removed without injury to the house or to the land. *Held,* that the grantor could maintain replevin. Central Branch R. R. Co. v. Fritz, 20 Kan., 430 (1878). In this case is a review of the other cases upon the subject; and it was further said that where a house and foundation are not built at the same time, as parts and portions of a single whole, placing the house upon a stone foundation is not sufficient to make it a part of the realty, any more than placing it upon a stone pavement or upon the earth.]

[Where a house is removed upon the land of a third party, and there is no privity of title between the ownership of the house and the ownership of such land, replevin will lie. Michigan Mut. Ins. Co. v. Cronk, 93 Mich., 49, 51 (1892).]

See, however, Reese v. Jared, 15 Ind., 142 (1860), which, however, is to

declaration in replevin for a saw-mill, steam-engine with fixtures, a barn, shingle-mill, office and shed, described in the declaration as goods and chattels, that they are not personal chattels; for although these things ordinarily are fixtures and a part of the realty, yet they may be personal property; and being described as goods and chattels, whether they are so or not is a matter of evidence.[5] But where the plaintiff in his affidavit for a writ of replevin stated that he was lawfully entitled to the possession of a certain steam saw-mill building, together with all the appa-

be distinguished from the above cases on the ground that in this case the party upon whose lot the house was removed was not a trespasser, but had bought the house in good faith from the person who had built it on the lot of the plaintiff, and had paid for it; and because the house had in this case been set upon a permanent brick foundation. [See Fisher v. Patterson, 197 Ill., 414, 417 (1902).]

[Where a house, which is a part of the realty, is sold as personal property, and removed to another lot belonging to the purchaser, where it is placed upon brick pillars sunk into the ground with the intention of making it a residence for the purpose of sale, it becomes real property, although an action of trespass might lie for its removal. Salter v. Sample, 71 Ill., 430, 433 (1874).]

[Replevin will not lie for a wooden partition. McAuliffe v. Mann, 37 Mich., 539, 542 (1877).]

[Detinue will not lie for the recovery of machines which are a part of the realty. McFadden v. Crawford, 36 W. Va., 671, 680 (1892). Nor for log buildings, and a ferry-boat with cables. Stimson v. Smith, 1 N. W. Ter., 109 (1889).]

[5] Brearley v. Cox, 24 N. J. Law, 287 (1854).

["Rails, as well as a string of fence, may be personal property." Fahnestock v. Gilham, 77 Ill., 637, 639 (1875).]

[It is a matter of defence to show that a corn-crib is real property. Smith v. Stanford, 62 Ind., 392, 395 (1878).]

[Where replevin was brought for "one frame building now in process of erection," etc., and the action was sent to another court where the plaintiff described the property as "all the lumber, laths, shingles, nails, joists, boards, and materials on lot," etc., "being the same chattels and personal property mentioned and described in the original petition filed in this cause, which petition is hereby made a part hereof," it was held that this was not a departure; and that the defendant by joining issue waived the error, if any. Waters v. Reuben, 16 Neb., 99 (1884).]

[Where a defendant, in his pleadings, avers that buildings, erected by the plaintiff upon lands of another without permission, were "owned, possessed and occupied" by such plaintiff, he is not at liberty to deny such averment, nor prove that such buildings became the property of the landowner. Myrick v. Bill, 3 Dak., 284 (1883).]

ratus, machinery and tackling belonging to the same, consisting of a steam-engine, etc., describing the land on which such mill was situated, but not stating that the property in question was personal estate, but simply alleging that plaintiff was the owner of the mill and appendages without showing the circumstances under which the same were put on the land, the affidavit was held defective and the proceedings dismissed.[6] Where a house or other fixture has been constructively severed from the realty and treated by the parties in interest as personalty, it is the subject of an action of replevin.[7] So, where one mortgages

[6] Chatterton v. Saul, 16 Ill., 149 (1854).

[The bare recital "that the plaintiff is the owner of the following described personal property, to wit: One frame two-story building about 28 feet wide by 30 feet long, and now located," etc., is a mere conclusion. It appears to be an action to recover real estate by replevin. The facts should be pleaded, so that the court may determine whether the action is properly brought. Demurrer sustained. Bridges v. Thomas, 8 Okla., 620 (1899).]

[An engine and gin machinery were sold under an attachment as personal property. The purchaser of the land at foreclosure sale, to whom the engine and machinery passed as real estate, in a trial of the right of property, sought summary judgment against the sureties upon a statutory claim bond. *Held*, that, as the purchaser maintained his title by proving that the property was real estate, without showing that by severance it had become personalty, he could not enter judgment upon the bond. Bull v. Jones, 9 Tex. Civ. App., 346 (1895).]

[7] Foy v. Reddick, 31 Ind., 414 (1869); Hensley v. Brodie, 16 Ark., 511 (1855). [Wells v. Merle & Heaney Mfg. Co., 66 Ill. App., 292, 298 (1896); District Township of Corwin v. Moorehead, 43 Iowa, 466, 469 (1876); Commissioners of Rush County v. Stubbs, 25 Kan., 322, 325 (1881); Duke v. Shackleford, 56 Miss., 552 (1879); McDaniel v. Lipp, 41 Neb., 713, 716 (1894); Wheeler v. McFerron, 33 Ore., 22, 23 (1898); Page v. Urick, 31 Wash., 601, 603 (1903); Fitzgerald v. Anderson, 81 Wis., 341, 344 (1892); Scarth v. Ontario Power Co., 24 Ont., 446 (1894); see, also, Seidel v. Cornwell, 166 Mo., 51, 55 (1901); Waters v. Reuber, 16 Neb., 99, 102 (1884).]

[A portable engine on wheels, capable of being moved from place to place, and some old irons of a saw-mill that had been burned, are personal property and subject to a personal action. Kennedy v. Clayton, 29 Ark., 270, 278 (1874).]

[Replevin can be maintained by the vendor of brewery fixtures under a conditional contract of sale, although attached. Ott v. Specht, 8 Hous., 61, 73 (Del., 1887).]

[Where a landlord attaches a steam-engine as the personal property of his tenant, it is an admission of record, whether conclusive is not deter-

articles annexed to the realty, describing them as goods and chattels, all persons claiming under him will be estopped from denying that they are goods and chattels as against persons claiming under such mortgage, without reference to the question how they are annexed to the soil; and in such a case as between these parties such annexations are proper subjects of an action of replevin.[8]

mined, that the property belongs to the tenant, and, necessarily, that it is not a part of the realty. Hewitt v. Watertown Steam Engine Co., 65 Ill. App., 153, 158 (1895).]

[A stave-machine, consisting of a line-shaft fastened by hangers bolted to joists in a mill, used to convey power thereto from an engine, some belting, an equalizer and a bucker, is personal property for which replevin will lie. Balliett v. Humphreys, 78 Ind., 388, 391 (1881).]

[Where a son erects houses by permission upon land of his father, which the father intends to give his son, and the houses are sold by the son, they are personal property, and, as such, can not be recovered after the statute of limitations has run. Dominick v. Farr, 22 S. C., 585 (1885).]

[However, in Eddy v. Hall, 5 Colo., 576, 581 (1881), it was *held* that a copartnership agreement that one of the partners is to receive rental for certain real estate, and that the value of buildings permanently attached thereto is to be credited to him upon the firm books, and that, at the termination of the copartnership, he is to take them back at a reduced price, and a sale by him after the termination of the copartnership, is not such a constructive severance as to make the buildings personal property.]

[8] Ballou v. Jones, 37 Ill., 95 (1865). [See, *ante*, p. *346.]

Replevin for taking the goods and chattels, to wit: one lime-kiln, etc., of the plaintiff. Avowry for rent in arrear. Plea in bar, that the lime-kiln was affixed to the freehold, and as such exempt from distress. Demurrer thereto. *Held*, that the plea in bar was bad, because it was a departure from the declaration which treated the lime-kiln as a chattel, while the plea treated it as affixed to the freehold. Judgment for defendant. Niblet v. Smith, 4 Term., 504 (1792). See, also, Lane v. Dixon, 3 C. B., 776 (1847).

[In an action of replevin for mill machinery, where the sheriff has returned that he replevied the goods, and the defendants plead *non cepit*, and property, they can not contend that the machinery was a part of the freehold. Alexander v. Cowie, 19 N. Brunsw., 599 (1880).]

[Where a fixture is severed from the soil so as to give to it the character of personalty, and litigation in regard thereto occurs both before and after severance, its character at the time the plaintiff is required to appear in court determines the procedure; and the fact that the mortgagee of the land, before severance, claims the fixtures as real estate, does not estop him after severance in another suit from claiming it as personal property. Jones v. Bull, 90 Tex., 187, 194 (1896).]

[Treating boilers as a part of the real estate by filing a claim for a

[*417] *A writ of replevin, however, is effectual for the delivery of personal property only,[9] and furnishes no justification to an officer who under it severs and delivers part of the realty.[10] Neither does replevin lie by a tenant or his assignee against the landlord for an unremoved fixture, whether annexed for

lien upon the real estate upon which they are located, which claim is afterwards released and not followed by suit, will not prevent such claimants from subsequently bringing an action of replevin for such boilers as personal property. Hacker v. Munroe, 56 Ill. App., 532, 540 (1894).]

[Where a mortgagee, having dismissed a suit in replevin against a chattel mortgagee for fixtures, remains in possession thereof and is sued upon his replevin bond, he should be permitted, under the statute, to show in mitigation of damages that the property could not, from its nature, be covered by a chattel mortgage; and he is not estopped by the fact that his affidavit for the writ called it personal property. Howell v. Barnard, 32 Ill. App., 120 (1889).]

[A chattel mortgagor of log houses and a ferry-boat and cables is not estopped from asserting that they are real estate. Stimson v. Smith, 1 N. W. Ter., 109 (1889).]

[9] Vausse v. Russel, 2 McCord, 329 (1823). [See Camp v. Charles Thatcher Co., 75 Conn., 165, 170 (1902); Oskamp v. Crites, 37 Neb., 837 (1893); McCormick v. Riewe, 14 Neb., 509 (1883).]

[10] Roberts v. Dauphin Deposite Bank, 19 Penn. St., 71 (1852). [See Bull v. Jones, 9 Tex. Civ. App., 346, 349 (1895); Alexander v. Cowie, 19 N. Brunsw., 599 (1880).]

[A contrary view, however, is taken in Sample v. Broadwell, 87 Ill., 617, 620 (1878). Said Sheldon, J., in delivering the opinion of the court: "Although ordinarily a dwelling-house is attached to, and forms a part of, the realty, and is to be presumed such, there may be circumstances existing in which it will be a personal chattel, and one may own and have belonging to him as his personal property, a house standing upon the land of another; and the latter was what the officer had the right to believe and act upon as the condition here. The writ recited upon its face that the plaintiff suing it out had made affidavit before the clerk that the house belonged to him as his goods and chattels, and was wrongfully detained by the defendant, and therefore the sheriff was commanded to cause the said goods and chattels to be replevied and delivered to the plaintiff. Surely it was not for the sheriff to set up against this the ordinary presumption that the house was part of the realty, and act thereon, and refuse to obey the writ. It did not belong to him to institute an inquiry whether or not the house was the personal property of the plaintiff, and execute the writ or not, according as he found the result. But he might rest upon the writ itself as his sufficient authority, and execute its command by the delivery of the property to the plaintiff, and if the defendant should thereby be wrongfully injured, his resort for redress should be to him who

purposes of trade or otherwise; so long as it remains annexed, it is a part of the freehold.[11] A title deed, however, though so connected with and essential to the ownership of real estate that it descends with it to the heir, is for the purpose of its recovery by a civil remedy, a personal chattel and hence recoverable in replevin.[12]

The rule stated at the beginning of this section is subject to a qualification arising out of the rule of law that the title to real property can not be tried in a transitory action. The rule on this subject was thus stated by Field, J., in Halleck v. Mixer[13]: "The plaintiff out of possession can not sue for *property severed from the freehold, where the defend- [*418] ant is in possession of the premises from which the property was severed, holding them adversely, in good faith, under claim and color of title;—in other words: the personal action cannot be made the means of litigating and determining the title to

sued out the writ, and not to the ministerial officer who obeyed the mandate of the writ."]

[Replevin will not lie for a coffin and its contents after interment; and a sheriff should refuse to obey such a writ. There is no property in such things. Guthrie v. Weaver, 1 Mo. App., 136, 141 (1876).]

[11] Brown v. Wallis, 115 Mass., 156 (1874). The article in question (which was not in terms decided to be a trade fixture, but only so considered to show that in the most favorable aspect of the case the plaintiff could not recover in that form of action) was a counting-room put into a store by a tenant, and consisted of a framework sheathed and paneled on both sides and fastened to the floor and walls by nails so securely as to require the use of a crow-bar to remove it; and it was necessarily separated into three pieces before it could be removed by the sheriff.

See, also, Folger v. Kenna, 24 La. Ann., 436 (1872), where in an action for the recovery, separate from the land, of the double iron doors and iron lining of a brick vault attached with plaster to the walls of a house and to the soil by a brick foundation, it was *held* that they were not recoverable separate from the premises in which located. [But see Hamilton v. Stewart, 59 Ill., 330, 333 (1871).]

[12] Wilson v. Rybolt, 17 Ind., 391 (1861). See, also, Atkinson v. Baker, 4 Term, 229 (1791). [See, *ante*, p. *230; and King v. Gilson, 32 Ill., 348, 354 (1863).]

[It is otherwise where there is a dispute about its delivery. Pasterfield v. Sawyer, 43 S. E., 799 (N. C., 1903); see, also, Pasterfield v. Sawyer, 45 S. E., 524 (N. C., 1903).]

[13] 16 Cal., 574 (1860).

the real property, as between conflicting claimants.[14] But this rule does not exclude the proof of title on the part of the plaintiff in other cases, for it is, as we have already observed, upon such proof that the right of recovery rests. It is because the plaintiff owns the premises, or has the right to their possession, that he is entitled to the chattel which is severed, and that must of course be in the first instance established. A mere intruder or trespasser is in no position to raise the question of title with the owner so as to defeat the action."[15] The rule above stated

[14] See Brown v. Caldwell, 10 S. & R., 114 (1823); Heaton v. Findlay, 12 Penn. St., 307 (1849); Powell v. Smith, 2 Watts, 126 (1833); Snyder v. Vaux, 2 Rawle, 423 (1830); Anderson v. Hapler, 34 Ill., 436 (1864); and the cases cited in the next note (*infra*). [Hines v. Good, 128 Cal., 38, 40 (1900); Smith v. Cunningham, 67 Cal., 262, 263 (1885); Hooker v. Latham, 118 N. C., 179, 186 (1896); Reniek v. Boyd, 99 Pa. St., 555, 558 (1882); Weed v. Hall, 101 Pa. St., 592, 595 (1882); see, also, Caldwell v. Custard, 7 Kan., 303 (1871).]

[A trespasser can not bring replevin for a house. Where a vendor of real estate under contract had some repairs made to the foundation of a house thereon, after default by the vendee, such house being locked and containing goods of the vendee, the vendee being temporarily absent, is not retaking possession so as to enable the vendor to maintain replevin for the house. Ellsworth v. McDowell, 44 Neb., 707, 711 (1895).]

[A purchaser of a building from a landlord can not bring replevin for the same against a tenant in possession. Riewe v. McCormick, 11 Neb., 261.]

[An action of replevin having been brought for wood and ties cut and removed from land, it was held that, upon the request of the defendant, under his averment that neither party was in possession of the land, and that the plaintiff claimed under an illegal tax purchase, the court properly transferred the cause to equity and canceled the plaintiff's tax-deed and awarded the wood and ties to the defendant. Rogers v. Kerr, 42 Ark., 100, 102 (1883).]

[The owner of the freehold can not maintain detinue if, at the time of severance, he had not actual or constructive possession of the land. Cooper v. Watson, 73 Ala., 252, 254 (1882).]

[15] Citing Harlan v. Harlan, 15 Penn. St., 507 (1850). [Washburn v. Cutter, 17 Minn., 361; see, also, Cutter v. Wait, 91 N. W., 753 (Mich., 1902).]

The rule above laid down has been approved in subsequent cases: Page v. Fowler, 28 Cal., 605 (1865); s. c., 37 Id., 100, where it was held that replevin for hay cut on public lands could not be maintained by a prior possessor against one in adverse possession claiming a pre-emption right when he cut the hay; S. P. in Page v. Fowler, 39 Cal., 412 (1870); Stockwell v.

Phelps, 34 N. Y., 363 (1866). See, also, the rule of Halleck v. Mixer, explained in Kimball v. Lohmas, 31 Cal., 154 (1866), which was in turn explained in Page v. Fowler, 39 Cal., 412, 417. In Kimball v. Lohmas, the defendants were in the adverse possession of the land at the time the wood was cut, but had no title or color of title; and in 39 Cal., 412, 418, it is said that all the cases show that there must be something more than a mere assertion of title, and that the court in such cases will look into the case to see if there is in reality a claim of title to try. To the last point, see, also, Harlan v. Harlan, *supra*, where it was said by Rogers, J.: "It is not the actual possession, but it is the actual *adverse* possession of a person who claims *title* to it, that is the criterion." * * * "The mere assertion of a title would be nothing. The court looks to the substance, and where it appears that in truth it is a trial of title, then it is properly ruled that replevin is not the proper action, but that it must be tried in another form. Beyond, the cases do not go, nor does public policy require they should."

In Kimball v. Lohmas, above referred to, Sanderson, J., said: "Adverse possession is of different kinds: First, where the possession is taken by bow and spear without color of title, but with the intent to claim the fee exclusive of any other right, and to hold it against all comers, which is the kind found in the present cases; second, where the possession is taken under a claim of title founded upon a written instrument, as a conveyance, or upon the decree or judgment of a court of competent jurisdiction. The first is sufficient to put the Statute of Limitations in motion, and, at the expiration of five years, vest in the usurper a right under the Statute which is equivalent to title; but until the Statute has run he is to the true owner a mere intruder, without right. It can not be said in any just sense that as between him and the true owner a case of conflicting titles is presented until the Statute has run; or that until then there can be, as between them, any substantial contest as to the title.

But as to the other, or second kind of adverse possession, the case is otherwise. There the possession is accompanied by at least a colorable title, and an actual and substantial contest as to the title must arise whenever the party out of possession undertakes to assert his rights in any kind of action, for they occupy the position of conflicting claimants as to the true title, and not as to the possession only. Where the defendant is in possession as a naked trespasser, and his right rests only upon a bold assertion which merely suffices to put the Statute of Limitations in motion, he is not in a position to contest the title of the plaintiff in such a sense as to defeat a personal action; for notwithstanding he may have alleged title in himself, it turns out to be false, and at the outcome it is made clear that title, although apparently a fact in issue, is so in no just sense, but only in seeming, and is in fact only exhibited by the plaintiff collaterally for the purpose of proving his right to the property in suit. Such is the rule announced in Halleck v. Mixer, as we understand that case, and if, as counsel for the appellants contend, that case creates an exception where none previously existed, we think it was not created too soon."

[*419] has been carried so far, that *where the plaintiff had recovered in ejectment land with a mill situated thereon, and, after judgment and before issuing a writ of *habere facias possessionem*, the defendant while yet in actual possession severed and removed from the mill the bolting-cloth, meal-chest, mill-spindle, etc., for the recovery of which the plaintiff brought replevin, it was held that such recovery in ejectment was not equivalent to actual possession, and that replevin did not lie.[1] In the application, however, of the above rule a distinction is [*420] to be made between actions for *taking away the substance of the estate itself, as fixtures, timber, etc., and those relating to annual crops, which contain both the value of the use of the land and the labor of the farmer, and such crops grown and actually harvested on the land by the defendant while in possession, it is held, may not be recovered in an action of replevin, the remedy of the owner of the land in such a case being by an action for the mesne profits after again recovering the possession of the land.[2] And the rule is the same though the crops be sown by the owner of the land and harvested by the disseisor.[3]

With respect to the damages recoverable in this form of action, it is to be observed that, although where one sues for damage to the freehold caused by the wrongful removal of a fixture, *e. g.*, a fence, he may recover the value thereof as it stood, if a part of the realty, yet where he sues in replevin for

[1] Powell v. Smith, 2 Watts, 126 (1833). In Harlan v. Harlan, already cited, in referring to this case, Rogers, J., said: "It is true there was a recovery in ejectment, but no *habere facias* had been issued, and, consequently, the possession of the defendant continued, as before, to be adverse. The remedy, therefore, was not replevin, but an action for mesne profits, or by writ of estrepement." See, also, Page v. Fowler, 39 Cal., 412, 416 (1870).

[2] See Stockwell v. Phelps, 34 N. Y., 363 (1866); Page v. Fowler, 39 Cal., 412 (1870); Brothers v. Hurdle, 10 Ired. Law, 490 (1849); Branch v. Morrison, 5 Jones's Law, 16 (1857); s. c., 6 Id., 16. [Cooper v. Watson, 73 Ala., 252, 255 (1882); Martin v. Thompson, 62 Cal., 618, 619 (1882); Edwards v. Eveler, 84 Mo. App., 405, 410 (1900).]

See, also, Page v. Fowler, 28 Cal., 605 (1865); s. c., 37 Id., 100; Raymond v. Andrews, 6 Cush., 265 (1850). See, however, Nichols v. Dewey, 4 Allen, 386 (1862). [Rowell v. Klein, 44 Ind., 290, 296 (1873).]

[3] DeMott v. Hagerman, 8 Cow., 220 (1828). [See Wakefield v. Dyer, 76 Pac., 151 (Okla., 1904).]

the materials as personal property, which are not taken on the writ, he can recover only their value as such.[4] So, in an action by the purchaser at a mortgage sale for wrongfully detaining machinery and other fixtures severed by a mortgagor (there being no claim for a wrongful taking), the admission of evidence of the expense of replacing the property in the mill from which it was severed, is error. The severance of the property in such a case is no part of the cause of action, but would have been the subject of an action of trespass, the action in this case being for the wrongful detention of the property after it became personalty.[5]

IV. TRESPASS.

Since fixtures while in a state of annexation are parcel of *the realty to which they are annexed, the action of [*421] trespass in its application to injuries thereto is governed by the general rules limiting its application as a means of redressing injuries to real property.

Trespass *quare clausum* lies against a sheriff for seizing under a *fi. fa.* the fixtures of the plaintiff, who is a freeholder.[6] So, trespass *quare clausum* lies in favor of one tenant against his co-tenant for the unauthorized disseverance, removal and destruction by such co-tenant of fixtures constituting a part of the common property.[7] And the unauthorized disseverance and removal by one co-tenant of machinery constituting fixtures in a sash and blind-factory, and its incorporation into another mill the sole property of such co-tenant, has been held to be such a practical destruction of the common property as to authorize an action of trespass by the co-tenant who did not consent thereto;[8] though a simple severance and removal would not, it seems, war-

[4] Pennybacker v. McDougal, 48 Cal., 160 (1874).

[5] Gardner v. Finley, 19 Barb., 317 (1855).

[6] Winn v. Ingilby, 5 B. & Ald., 625 (1822); Goddard v. Bolster, 6 Me., 427 (1830).

[7] Maddox v. Goddard, 15 Me., 218 (1839); Symonds v. Harris, 51 Me., 14 (1862).

See 1 Chit. Plead. (16 Am. ed.), 89, 175, 192, 200. Murley v. McDermott, 3 N. & P., 356 (1838).

[8] Symonds v. Harris (*supra*). See, also, Sparks v. Leavy, 19 Abb. Pr., 364 (1863); s. c., 1 Robt., 530, an action by one tenant in common in pos-

rant the action.[9] So, in those States where a mortgage is held to be a conveyance of the land, and the possession of the mortgagor is considered as the possession of the mortgagee, the mortgagee or his assignee may maintain trespass *quare clausum* against any one who under authority from the mortgagor remaining in possession enters and removes fixtures from the premises, whether annexed before or after the execution of the mortgage.[10]

session under a contract with his co-tenants to convey to him against a third person for injury to fixtures in which the whole damages were held recoverable by him.

[9] Gibson v. Vaughn, 2 Bail., 389 (1831). See, also, Murley v. McDermott (*supra*).

[10] Cole v. Stewart, 11 Cush., 181 (1853); Smith v. Goodwin, 2 Me., 173 (1822). See, also, Harris v. Haynes, 34 Vt., 220 (1861). [Linscott v. Weeks, 72 Me., 506, 509 (1881); Atkinson v. Hewitt, 63 Wis., 396 (1885); see Fisk v. People's Bank, 14 Colo. App., 21, 26 (1899).]

[In the absence of an agreement, express or implied, denying the mortgagee the right of immediate possession, the mortgagor can not maintain trespass against the mortgagee for removing fixtures. Chellis v. Stearns, 22 N. H., 312 (1851).]

But a mortgagee out of possession and without the right of possession can not maintain trespass *quare clausum* against a stranger for breaking and entering the mortgaged premises. Gooding v. Shea, 103 Mass., 360 (1869).

[Where the mortgagee is given an order by the mortgagor to cut the hay upon the mortgaged premises, and apply the proceeds upon the indebtedness, he has an interest in the soil and sufficient possession to maintain trespass *qu. cl.* against a stranger who enters, cuts and carries away the hay after being notified not to do so. Burley v. Pike, 62 N. H., 495 (1883).]

[A mortgagee, whether in possession or not, may maintain an action on the ground that his security has been diminished, as long as anything is due. The mortgagor in possession may also recover for the same injury, but the defendant is not compelled to make two satisfactions; and, as against the mortgagee, he can show, in mitigation of damages at least, that, since the injury, there has been a change of relation to the property whereby the mortgagee can be indemnified by a less sum. King v. Bangs, 120 Mass., 514 (1876).]

[A mortgagee, with the right of possession, can maintain the action of trespass *quare clausum*, the legal title being in him, if his security is affected. Leavitt v. Eastman, 77 Me., 117, 119 (1885).]

[Trespass *q. c.* for removing manure lies against the mortgagor by the mortgagee entitled to immediate possession, although he is for a time postponed in getting possession by legal process; and it lies against one buying

*On the other hand, it is well settled that a lessor can- [*422] not maintain trespass *quare clausum* against a stranger for severing and removing fixtures, trees, crops, etc., while there is a tenant in possession of the premises.[1] Neither can he maintain this action against his tenant for wrongfully severing and removing fixtures during the term; nor against the sub-tenant at will of his tenant.[2]

So, under an agreement for the sale of land, the payment of the purchase money and the execution of the deed being

the manure from the mortgagor and taking it away. Vehue v. Mosher, 76 Me., 469, 470 (1884).]

[A mortgagee, alleging that the removal of a building pending foreclosure proceedings, lessened his security, can not recover by showing a deficiency under the foreclosure and sale, if the foreclosure was void. Taylor v. McConnell, 53 Mich., 587 (1884).]

A mortgagor can not maintain trespass for the removal of buildings (theretofore erected by mortgagee in possession) intermediate the decree on a bill to redeem and the issuing of a writ of possession, the mortgagor not being in possession. Taylor v. Townsend, 8 Mass., 411 (1812).

A tenant for a term of years demised the premises to plaintiff by way of mortgage by deed dated March 24, 1838, expressed to hold thenceforth during the remainder of the term less one day, and, thereby also assigned to plaintiff the fixtures, etc., therein to hold to the plaintiff for his own absolute use and benefit, subject to the proviso thereinafter contained for a reconveyance on repayment of the mortgage money on the 24th of June then next, and also, that on non-payment on that day it should be lawful for the mortgagee to enter upon and receive and take the rents and profits of the said leasehold and other premises, and if he should think proper so to do of his sole authority to sell or underlet the premises, and to sell the fixtures and chattels. There was no covenant that the mortgagor should remain in possession till June 24th, but the court held that looking at the whole deed the plaintiff's right to take possession did not attach till that day, and that, therefore, the mortgagee could not maintain trespass for an entry or for an asportavit of the fixtures, etc., made before that day by a third party. Wheeler v. Montefiore, 2 Q. B., 133 (1842); s. c., 6 Jur., 299; 1 Gale & Dav., 493.

[1] Campbell v. Arnold, 1 John., 511 (1806); Gibbons v. Dillingham, 10 Ark., 9 (1849). [Uttendorffer v. Saegers, 50 Cal., 496, 498 (1875); Reynolds v. Williams, 1 Tex. Repts., 311, 312.]

[This rule has been changed by statute in New York. Taylor v. Wright, 51 App. Div., 97, 99 (1900).]

[2] Schermerhorn v. Buell, 4 Den., 422 (1847); Tobey v. Webster, 3 John., 468 (1808). Per Yates, however, in this case: "An action of trespass may be maintained by a landlord against a tenant at will, for waste, because the injury determines the estate, and the possession considered as

concurrent acts to be done in the future, although the vendee acquires an equitable interest and the right to specific per- [*423] *formance on payment made, yet, not having the legal title nor the possession, he cannot maintain trespass for an intermediate removal of fixtures by the vendor.[3] So, an heir, or devisee cannot, it is said, bring trespass *quare clausum* to try the right to fixtures as between himself and the executor, till after entry made;[4] though in the United States the doctrine does not seem to have been universally accepted, the owner in some States being allowed to maintain trespass without actual entry, on the principle that possession follows the ownership, unless there be an adverse possession.[5]

Whatever may be the rule as to constructive possession in the case of real estate, the rule is well settled that where fixtures, timber, etc., have been severed from the freehold and thereby reduced to the condition of chattels, the person in whom is vested the right of property from the time of severance, may maintain trespass *de bonis asportatis* for their removal; because the general property of personal chattels draws to itself the legal possession.[6] Thus, it lies by the grantee of real estate in

thereby actually in the landlord.'' See, also, 8 Edw. IV., 8; 12 Id., 8; Litt., § 71; Saville, 84; Dy. 121b; Com. Dig., Tresp., B 2; Bull. N. P., 84; 1 Chit. Plead., 200, and cases cited.

[3] Tabor v. Robinson, 36 Barb., 483 (1862).

[4] Anonymous, 2 Mod., 7 (1686); Plowd., 142; 1 Chitty Plead., 197, 198. See, also, 21 H. VII, 26 (1506); Ferard Fixt., 290.

[5] See Van Brunt v. Schenck, 11 John., 385 (1814), per Spencer, J.; Cohoon v. Simmons, 7 Ired., 189 (1847); McGraw v. Bookman, 3 Hill (S. C.), 265 (1837). See, also, 1 Chitty Plead. (16 Am. ed.), 197, and the cases cited.

[6] See Ferard Fixt., 290; Wadleigh v. Janvrin, 41 N. H., 503 (1860). [Westgate v. Wixon, 128 Mass., 304, 307 (1880); Gasco v. Marshall, 7 Up. Can. Q. B., 193, 196; Meyers v. Marsh, 2 Up. Can., Q. B., 148.]

[A purchaser of a growing crop can maintain trespass *de bonis asportatis* but not *quare clausum fregit* against the seller, the landowner in possession of the land, for injury thereto; and he is not estopped because the price is paid after the trespass was committed, where the sale was on credit. Meinke v. Nelson, 56 Ill. App., 269, 271 (1894).]

[One not in possession of land who has bought grass growing thereon can maintain trespass against one who cuts and carries it away. Avitt v. Farrell, 68 Mo. App., 665, 668 (1896).]

[One having title to lands can not maintain trespass for trees cut and removed therefrom while another, in possession, is holding adversely. The

possession for the wrongful removal of fixtures by the grantor.[7] So, fixtures belonging to the landlord and demised by him with the land to the tenant, or which for any reason the tenant has no right to sever and remove, timber, virgin soil, etc., wrongfully severed and removed by a tenant during his term, may be recovered by the landlord in trespass *de bonis*.[8] In like manner the owner of land in possession of a tenant may maintain trespass *de bonis* against a stranger for taking and carrying away fixtures belonging to the landlord, timber, etc., wrongfully severed by him from the *land.[9] A question has, however, [*424] been made whether an action of trespass *de bonis asportatis* for the removal of fixtures after their severance could be maintained in a case where the severance and removal are one continued and entire act;[10] and the case of Udal v. Udal[11] is cited

title can not be litigated in a personal or transitory action; otherwise a *bona fide* occupant might be harassed by a multiplicity of suits, all of which should more properly be embraced in one action for mesne profits after or during recovery in ejectment. Beatty v. Brown, 76 Ala., 267, 269 (1884).]

[Trespass can be maintained by one not in actual possession of the land if he has the legal title, and the trespasser is not in possession, and does not claim title. Jenkins v. Lykes, 19 Fla., 148, 160 (1882).]

[And it is held in Alliance Trust Co. v. Nettleton Co., 74 Miss., 584, 592 (1896), that trover or trespass *de bonis asportatis* can be maintained by the disseizee, the true owner, after his re-entry, for the value of trees cut by the first or second disseizor or their grantees intermediate the disseizin and such re-entry.]

[An administrator can recover for injuries to real estate caused by cutting and carrying away standing timber, committed after the death of the intestate and before he takes possession of the real estate. Noon v. Finnegan, 32 Minn., 81 (1884).]

[7] Wadleigh v. Janvrin (*supra.*)

[8] See Schermerhorn v. Buell, 4 Den., 422 (1847); Higgon v. Mortimer, 6 C. & P., 616 (1834); Udal v. Udal, Alcyn, 82 (1648); Liford's Case, 11 Co., 48 (1614); Bowles's Case, 11 Co., 81 b (1615).

[9] Bulkley v. Dolbeare, 7 Conn., 232 (1828); Ward v. Andrews, 2 Chitty, 636 (1772). [Babley v. Vyse, 48 Iowa, 481, 483 (1878); Bailey v. A. Siegel Co., 54 Mo. App., 50, 54 (1893); Parker v. Shackelford, 61 Mo., 68, 72 (1875); Smith v. Felt, 50 Barb., 612, 615 (N. Y., 1868). See Murphy v. Stafford (1852), 4 Ir. Jur., 231, 232.]

[Landlord can bring action against one having no title who removes gravel from the land. Mayor of Carterville v. Lyon, 69 Ga., 577, 580 (1882).]

[10] Ferard Fixt., 292.

as bearing upon the question, where it is said to have been agreed by the court "if a lessee for years cuts down timber trees and lets them lie, and after carries them away, so that the taking and carrying away be not as one continued act, but that there be some time for the distinct property of a divided chattel to settle in the lessor, that an action of trespass *vi et armis* would lie in such case against the lessee; and that in such case felony might be committed of them; but not where they have taken and carried away at the same time." Although the distinction so far as it refers to the crime of larceny has, *in favorem vitae*, been recognized in subsequent cases,[12] yet even there a slight interval between severance and removal will make the thing removed a chattel;[13] and the distinction so far as it applies to the action of trespass *de bonis asportatis*, or trover, seems entirely too subtle and refined ever to be generally adopted, and does not seem in fact to have been alluded to or adopted in subsequent cases, though circumstances raising the question must have frequently happened.[14]

[*425] *A tenant or his vendee may also recover in this form of action against a wrong-doer for the asportation of fixtures,

[11] Aleyn, 82 (1648). See, also, Bull. N. P., 84; Vin. Abr., Trees, A, G; 2 Roll. Abr., 119; Com. Dig. Biens, H; 3 Bing., 136; Barnes v. Burt, 38 Conn., 541 (1871), cited *post* in this sec.

[12] See *post*, chapter on Criminal Law.

[13] See Spooner v. Brewster, 3 Bing., 136 (1825); s. c., 10 Moore, 494; 2 C. & P., 34, per Best, C. J.

[14] See Berry v. Heard, Cro. Car., 242 (1622); s. c., Palm., 327; Bend., 141; W. Jo., 255; Skidnes v. Huson, Noy, 125 (1607); 2 Roll. Abr., 119; Ferard Fixt., 299; *post*, Trover.

[Rails, when made into a fence, become a part of the land; and where they are removed and carried away by the same continuous act, it is not trespass to personal property. State v. Graves, 74 N. C., 396 (1876).]

Where fixtures are severed from the freehold and remain on the premises for a period, but are subsequently removed, the Statute of Limitations is no bar to an action for the removal brought within six years thereafter, although more than six years have elapsed since the severance. Morgan v. Varick, 8 Wend., 587 (1832).

[When timber is cut and hauled away, the trespass may be considered as a continuing trespass, not completed until the timber is hauled away; and, under these circumstances, the statute of limitations would not commence to run until the removal of the timber was completed. Sullivan v. Davis, 29 Kan., 28, 34 (1882).]

nursery trees, shrubs, plants, etc., removable by the tenant as against his landlord.[15] The tenant in possession, also, it is said, has during the term a sufficient interest in the fixtures to enable him to maintain trespass *de bonis asportatis* or trover against a third party who wrongfully removes them, although at the end of the term he may be bound to leave them for the use of the landlord;[16] for during the term he has a special property therein. So, where A. granted to B. and his heirs, liberty, license, power and authority to build a bridge on A.'s land for public use, and B. covenanted to build the bridge and maintain the same in repair, and that such bridge and the road leading to and from it should forever remain as a public highway free from toll, it was held that as against a wrong-doer the property in the materials of the bridge, when built and dedicated to the public, still continued in B., subject to the public easement, and that when severed and taken away by a wrong-doer, he might maintain trespass *de bonis* for such materials.[17] So,

[15] See Miller v. Baker, 1 Met., 27 (1840); s. c., 3 Law Reporter, 148. In this case the tenant had sold and delivered nursery trees, etc., while rooted in the ground, to the plaintiff, and after such sale they were levied upon on an execution against the tenant and kept by the officer rooted in the greenhouse and garden, no one being permitted to remove them; and this taking them into possession and excluding the owner from the lawful exercise of his rights over them was treated as a conversion sufficient to warrant trespass *de bonis*, the trees, etc., being considered mere personal chattels. See, however, Davis v. Danks, 3 Exch., 435 (1849); Lee v. Risdon, 7 Taunt., 191 (1816), and other cases cited *post*, to the point that fixtures during annexation are realty.

[16] See Hitchman v. Walton, 4 M. & W., 409, 416 (1838), per Parke, B.; Boydell v. McMichael, 1 Cr. M. & R., 177, 179 (1834), per Parke, B.; Bowles's Case, 11 Co., 82 (1615); Bull. N. P., 33; Vin. Abr., Trees, G.

See, however, Evans v. Evans, 2 Camp., 491 (1810), where it was held at *nisi prius* that a tenant for years could not maintain trespass *de bonis asportatis* for timber cut down on the demised premises. Lawrence, J.: "The plaintiff had no property or interest whatsoever in the trees after they were severed from the freehold. They were then in the legal possession of the reversioner, and he alone could maintain trespass for the asportation."

[17] Harrison v. Parker, 6 East, 154 (1805). Lord Ellenborough, C. J.: "They [the materials] were dedicated by him to the public for given purposes, but a scintilla of property still remained in him; and when those purposes could no longer be answered by their ceasing to be combined in that form in respect of which the dedication was made, without saying that

[*426] *where fixtures, timber, trees, etc., constituting a part of the premises demised to the tenant, are wrongfully severed by the landlord or by one acting under his authority, it seems that the landlord and the party so acting under him in effecting such wrongful severance cannot take advantage of their own wrongful act, and are estopped from claiming that the tenant's interest in the thing so severed is thereby terminated, and hence that the tenant may recover therefor in trespass.[18]

he could have severed them himself, they returned to him again as his absolute property, and he may well maintain this action against a wrongdoer for the materials now subsisting in the shape of several chattels. It is something analogous to the case where the founder of an eleemosynary foundation dedicates his land to its support, and it afterwards ceases, the land reverts to him or his heirs. Here there was a qualified right of property subsisting in the plaintiff after the dedication of the bridge to the public, which upon the severance of the materials became a perfect right of property in him."

See, also, 8 Taunt., 614.

[A land-owner constructed a sidewalk in front of his lot. Forty-five years later, the city, in constructing a drain, removed the granite curbstones, substituting others, and sold those which had been removed. The land-owner brought trespass *d. b. a.* against the person who assisted in carrying them away. *Held,* that the defendant was liable, as, in the absence of proof, the land-owner owned to the middle of the street; that, at most, he dedicated the use only of such sidewalk to the public, which to be complete, must be proved to have been accepted; and that, while the city might have used the material for repairs, such material could not be sold. Muzzey v. Davis, 54 Me., 361 (1867).]

[Trespass *q. c.* does not lie against one fastening his boat to a bridge which forms the public highway over a navigable stream, although the bridge rested upon the soil of the plaintiff. Parsons v. Clark, 76 Me., 476 (1884).]

[18] See Pitt v. Shew, 4 B. & Ald., 206 (1821); Channon v. Patch, 5 B. & C., 897 (1826). Holroyd, J., in this case said: "The landlord (under whom the plaintiff claims as vendee) cannot by wrongfully cutting down the trees acquire a right to them so as to entitle him to maintain trespass against the tenant for taking them away. That would be allowing him to take advantage of his own wrong, for the lessee, during the term being entitled to the usufruct of the trees, might have maintained an action on the case against the landlord for wrongfully cutting them down." See, also, Twigg v. Potts, 1 Cr. M. & R., 89 (1834); Vin. Abr., Trees, A. [See Meinke v. Nelson, 56 Ill. App., 269, 271 (1894); Willis v. Branch, 94 N. C., 142, 150 (1886).]

A. hired of B. certain rooms with the privilege of putting a brass plate with A.'s name thereon upon the front door there to remain so long as he

*But although an auctioneer has a special property as [*427] bailee in goods and chattels put into his possession for the purpose of sale, whether such goods be in his own rooms or in the house of another person, yet where put into possession of a house for the purpose of selling in lots, machinery and fixtures, to be sold as fixtures attached to the freehold, the purchaser being bound to detach and remove them, such auctioneer has not such a possession of the house and fixtures as to entitle him to bring trespass *de bonis* for their wrongful removal. He was only authorized at the time of his employment to sell the right of detaching and removing the fixtures; has no possession of them as materials; and is not in possession of the freehold.[19]

With reference to the proper manner of describing the property in question in the pleadings in actions of tort for injuries to fixtures, some questions have arisen which will be referred to at this place.

The value of fixtures illegally taken has been held to be recoverable in trespass under a declaration for breaking and entering plaintiff's dwelling-house and for taking divers "goods and chattels, and effects," Abbott, C. J., observing that fixtures might be taken in execution under a *fieri facias* which contains similar words.[20]

should continue to occupy the apartments. Subsequently the rent being in arrear B. removed the brass plate from the door and refused A. access to his apartments. In trespass by A. charging that B. broke and entered A.'s apartments and expelled him therefrom, that he removed the plate of plaintiff from the outer door and seized and converted his goods, B., among other pleas, pleaded that A. was not possessed of the brass plate *modo et forma*, on which issue was taken. *Held*, that the removal of the plate having been complained of in the declaration as a substantive trespass and issue taken on the possession of the plate as a chattel, it was not competent for defendant to change his ground. If defendant had meant to contend that it was so fixed to the freehold as to have ceased to be a chattel, he should in his plea have shown how it was in fact fastened, and not having done so, it was too late to urge the point on the rule *nisi* to enter verdict for defendant or a nonsuit on the ground that the removal of the plate was not a substantive trespass. Lane v. Dixon, 3 C. B., 776 (1847); s. c., 11 Jur., 89; 16 L. J., C. P., 129. See, also, Welch v. Nash, 8 East, 394 (1807).

[19] Davis v. Danks, 3 Exch., 435 (1849); s. c., 18 L. J., Exch., 213. See, however, Miller v. Baker (*ante*).

[20] Pitt v. Shew, 4 B. & Ald., 206 (1821). The articles in question in this

On the other hand under a declaration by an administratrix complaining of injuries to the "personal chattels" of the intestate, no recovery can be had for injuries to the trade fixtures of a [*428] tenant firmly affixed to a building by bolts and *screws, they not being personal chattels.[21] In order to avoid all question in similar cases where the injury complained of is done to property while in a state of annexation to the freehold, the property should be described in terms applicable to it only in a fixed state.[22]

case probably were not removed till several days after their severance. See s. c. on motion for a new trial, 4 B. & Ald., 208; Parke, B., in Hallen v. Runder, 1 Cr. M. & R., 266, 276 (1834); Ferard Fixt., 293, note. See, also, Twigg v. Potts, 3 Tyrwh., 969 (1834); s. c., 1 Cr. M. & R., 89; 3 L. J. (N. S.), Exch., 336.

[21] Barnett v. Lucas, 5 Ir. Com. Law, 140 (1870). [Reversed in (1872) Ir. R., 6 C. L., 247.] See, also, Pim v. Grazebrook, 4 Scott N. R., 565 (1842).

[22] See Ferard Fixt., 293, and the cases cited in the following pages. See, also, Richardson v. Ardley, 38 L. J. Chanc., 508 (1869); Dyer, 108 b, pl. 31.

Where plaintiff declared in trespass to personal property for taking and carrying away his "small fish-house or camp," and in another count for destroying his "wooden camp or small house," situated on a small island in another State, it not appearing that the building stood on land owned by any private individual, and the plaintiff making no claim to the land; and it appeared that the house or camp was a building about nineteen feet square, one story high, with no cellar, used by plaintiff and his men to live in every spring while carrying on the salmon fishery, it was *held* that there was no legal presumption from the declaration and evidence that the building was real estate, and that if defendant would oust the courts of Massachusetts of jurisdiction on the ground that the action was a local one, he should prove it so, and not having produced any evidence at all the plaintiff was entitled to recover. Rogers v. Woodbury, 15 Pick., 156 (1832).

[An action for injury to a wooden tent erected upon the land of another under a parol license, is transitory, and can be brought in another county than that in which the building is located. Ford v. Burleigh, 62 N. H., 388, 391 (1882). See Laird v. Railroad, 62 N. H., 254, 261 (1882).]

[Where the lower court, in an action of trespass *qua. cla.*, has rendered judgment for the plaintiff, every reasonable intendment is to be made in support of it; and where the facts found are consistent with the theory that a meetinghouse horseshed, the subject of the suit, was so attached as to the realty as to become a part of it, the judgment will not be reversed. Kelly v. Seward, 51 Vt., 436, 440 (1879).]

With respect to the measure of damages in actions of trespass *quare clausum fregit* for injuries to real property, it may be laid down that, although the asportation of fixtures, trees, etc., may be a ground for maintaining the action of trespass *de bonis asportatis,* or trover, yet it may be laid also as an aggravation in trespass.[23] And, though in trover the plaintiff can only recover the value of the fixtures wrongfully severed *as [*429] chattels,[24] though it be less than their value was as fixtures, yet in trespass their actual value as fixtures may be recovered.[25]

[Where a steam-barge ran into a boom of logs, which consisted of connected timbers chained at one end to a clump of piles, and at the other to a dock, it was *held* to be a trespass upon real property, and within the jurisdiction of a state court. John Spry Lumber Co. v. Steam-barge C. H. Green, 76 Mich., 320, 331 (1889).]

[A fence being part of the realty, an action of trespass *q. c.* for taking it away raises a question as to the title to real estate which is beyond the jurisdiction of a justice of the peace. Murray v. Van Derlyn, 24 Wis., 67 (1869).]

In Coddington v. Beebe, 29 N. J., 550 (1862); (s. c., 31 Id., 477), upon demurrer to a declaration to enforce a mechanics' lien against a "certain building and fixture for manufacturing purposes, and the fixed machinery and gearing attached to and connected therewith and making a part thereof, known by the name of a floating-dock" (describing it), and also upon the estate of the owner of said building in the land whereon the said building stood and to which it was attached. *Held,* that it was impossible to determine from the declaration whether such floating-dock was or was not a fixture, and the judgment below overruling the demurrer and giving judgment for plaintiff was reversed and the record remitted. [See, *ante,* p. *289.]

[23] Anderson v. Buckton, 1 Str., 192 (1719); Barnes v. Burt, 38 Conn., 541 (1871), where in trespass by husband and wife for an entry on the land of the wife, and the severance and removal of a pump so affixed to the land as to become a fixture, the plaintiffs were held entitled to recover for the removal of the pump, if the entry, severance and removal were one continuous act. See, also, Weeton v. Woodcock, 5 M. & W., 587 (1839); s. c., Id., 143.

[24] Clarke v. Holford, 2 C. & K., 540 (1848), and cases cited in the next section.

[25] Moore v. Drinkwater, 1 Fost. & Fin., 134 (1858). [Rhoda v. Alameda County, 58 Cal., 357 (1881); Kent County Soc. v. Ide, 128 Mich., 423, 426 (1901); Beck v. Zimmerman, 75 N. C., 60 (1876).]

[The measure of damages for removing an oil-tank used for the purpose of lighting a theatrical hall, would be the cost of returning the tank, of repairing injuries and the loss resulting from disappointment of existing

Thus, where the assignees of a bankrupt sold at auction fixtures belonging to the plaintiff and situated on demised premises, for £36 16s., which was their fair value sold in that manner, but their value if sold at a valuation as between incoming and outgoing tenants would have been £80, in trespass for taking and carrying away the goods, chattels, fixtures and effects of plaintiff, it was held by the Court of Queen's Bench that the assignee was not entitled to take advantage of his own proceeding in separating the fixtures from the house, according to ordinary experience it being most probable they would be sold with it, and that plaintiff was entitled to recover damages according to the latter estimate.[26] So, in trespass for removing the fruit trees from an orchard, the measure of damages is the orchard as it was situated upon the ground, *i. e.,* what it was worth to the tract of land, and not the value of the trees which were removed.[27]

Where, however, in trespass *quare clausum fregit,* the plaintiff complains not only of injury to land, but that his dwelling-house was destroyed, and the cause is tried upon plea of title, he cannot upon error brought insist that the house was personalty for the destruction of which trespass would lie. The gist of the action in such case is the injury to the land, the allegation as to destruction of the dwelling being merely matter of aggravation; and unless the evidence sustains the charge of injury to the land the plaintiff is not entitled to recover.[28] But

engagements for entertainments. Willis v. Branch, 94 N. C., 142, 149 (1886).]

[Where a building is destroyed, the extent of the recovery of a life tenant is not the value of the fixture, but is to be approximated by taking into consideration its rental value less taxes and repairs, and multiplying by the probable duration of life. Sagar v. Eckert, 3 Ill. App., 412, 417 (1879).]

[26] Thompson v. Pettitt, 10 Q. B., 101 (1847); s. c., 11 Jur., 748; 16 L. J., Q. B., 163.

[27] Mitchell v. Billingsley, 17 Ala., 391 (1850). See, also, Ivey v. McQueen, Id., 408 (1850); Whitbeck v. N. Y. Central R. R. Co., 36 Barb., 644 (1862). [See White v. Stoner, 18 Mo. App., 540 (1885).]

[28] Houghtaling v. Houghtaling, 5 Barb., 379 (1849). [Burleigh v. Ford, 59 N. H., 536 (1880); see, also, Missouri, &c., R'y Co. v. Lycan, 57 Kan., 635, 640 (1897); Johnson v. Willoughby, 3 Tenn. Cas. (Shannon), 338, 341 (1875).]

if the thing destroyed, although it is part of the realty, has a value which can be accurately measured and *ascertained [*430] without reference to the value of the soil in which it stands, or out of which it grows, the recovery must be for the value of the thing thus destroyed, and not for the difference in the value of the land before and after such destruction.[29] And in trespass for digging and cutting the plaintiff's close and carrying away the soil, the proper measure of damages was held by the Court of Exchequer to be the value to the plaintiff of the land removed and not the expense of restoring the land to its original condition.[30]

With reference to the measure of damages in actions of trespass *de bonis asportatis* in cases of injuries to real estate, it is to be observed that his class of cases falls as regards the question of damages properly under the head of torts to personal property, for the consideration of which the reader is referred to the professed treatises on the subject of damages.[31]

[When the action is for breach of the close, damages for the removal of fixtures are incidental to the action and separable from it. King v. Bangs, 120 Mass., 514, 515 (1876).]

[The breaking of an awning-post belonging to another, rightfully attached to the sidewalk and the owner's house, is trespass. Schergens v. Wetzell, 12 Mo. App., 596.]

[Removing the drivepipe, casing and tubing from a gas-well is an injury to real estate, whether such structures are personalty or realty. Ohio Oil Co. v. Griest, 30 Ind. App., 84 (1902).]

[29] Per Johnson, J., in Whitbeck v. N. Y. Central R. R. Co. (*supra*). [Hunt v. Boston, 183 Mass., 303, 307 (1903).]

[If the value of the timber cut covered the damage done to the land, that should be the basis of the verdict; but, if not, the amount should be fixed at the damage done the land by cutting and removal of timber. Thompson v. Moiles, 46 Mich., 42, 44 (1881).]

[The measure of damages for the destruction of an immature crop is its value at the time it is destroyed, which is not what it is worth for immediate use, but is ascertained by deducting the cost of harvesting and threshing from the probable amount the crop would have yielded at the market season. Scanland v. Musgrove, 91 Ill. App., 184, 186 (1900).]

[30] Jones v. Gooday, 8 M. & W., 146 (1841). [Donovan v. Consolidated Coal Co., 88 Ill. App., 589, 597 (1899); Karst v. St. Paul, S. & T. F. R. R. Co., 22 Minn., 118, 123 (1875).]

[31] See Sedg. on Dam., ch. v., p. *145; ch. xxii., p. *528, *et seq.*

V. Trover.

Fixtures, trees, etc., when unlawfully severed from the soil, become, at the option of the owner of the freehold to whom they belonged before severance, personal property, for the wrongful asportation or assumption of dominion over which after their severance trover lies at the suit of such owner.[32] And the action lies without any demand or refusal against a *bona fide* purchaser [*431] of the thing severed by a trespasser *though the defendant was ignorant of the trespass when he converted the thing severed to his own use.[33] So, in those States where a mortgage

[32] Phillips v. Bowers, 7 Gray, 21, 26 (1856); Moody v. Whitney, 34 Me., 563 (1852); Strickland v. Parker, 54 Me., 263 (1866); Mooers v. Wait, 3 Wend., 104 (1829); Riley v. Boston Water Power Co., 11 Cush., 11 (1853); Higgon v. Mortimer, 6 C. & P., 616 (1834); Berry v. Heard, Cro. Car., 242 (1622); s. c., Palm., 327; Bend., 141; W. Jo., 255; Farrant v. Thompson, 2 D. & R., 1 (1822); s. c., 5 B. & Ald., 826; Weeton v. Woodcock, 7 M. & W., 14 (1840). See, also, Oliver v. Vernon, 6 Mod., 170 (1704); s. c., Holt, 332. [Nelson v. Burt, 15 Mass., 204 (1818); Westgate v. Wixon, 128 Mass., 304, 307 (1880); Mueller v. Olson, 90 Minn., 416, 417 (1903); Shepard v. Pettit, 30 Minn., 119, 121 (1883); Bailey v. Sweeney, 64 N. H., 296, 297 (1886); Reynolds v. Dechman, 2 Nova S. L. R., 459 (1881); Cleaver v. Culloden, 15 Up. Can., Q. B., 582, 584; see, also, Connor v. Squiers, 50 Vt., 680, 683 (1878).]

[Trover may be brought for timber severed in another state. Tyson v. McGuineas, 25 Wis., 656 (1870).]

If a tenant of a farm takes and removes from the premises and converts to his own use the manure made thereon in the ordinary course of husbandry, the landlord may recover therefor in trover or trespass *de bonis asportatis*. See Plumer v. Plumer, 30 N. H., 558 (1855); Daniels v. Pond, 21 Pick., 367 (1838). [See, *ante*, p. *122.]

So, trover lies in favor of the grantee against the grantor of land for the removal and conversion by grantor of the manure accumulated in the barnyard and in heaps at the windows of the stables of the granted premises. Stone v. Proctor, 2 D. Chip., 108 (1824).

[Where a mortgagor of a farm is left in possession, upon his solicitation, after the mortgagee obtains a writ of possession, and the night before leaving under his agreement, sells the manure upon the farm to one knowing that the mortgagee claims it, the mortgagee can maintain trover against the purchaser. Chase v. Wingate, 68 Me., 204, 207 (1878).]

[33] Riley v. Boston Water Power Co., 11 Cush., 11 (1853). See, also, Farrant v. Thompson, 2 D. & R., 1 (1822); s. c., 5 B. & Ald., 826. [Freeman v. Underwood, 66 Me., 229, 232 (1877).]

Where, however, the fixture was severed and shipped by the mortgagor

is considered a conveyance of the land to the mortgagee, the rule first above stated applies, and the mortgagee may bring trover for fixtures unlawfully severed and converted.[34]

If a landlord under a distress for rent *arrere* severs the tenant's fixtures from the freehold and sells them, he is liable in trover therefor.[35] The articles may be described in the declara-

accompanied by a bill of lading to an agent for sale, who sold it and indorsed the bill of lading to a *bona fide* purchaser without notice, it was held that, though a fixture, the bill of lading in regard to the transfer of the property like a bill of exchange was good unless affected by notice, and that therefore trover did not lie by mortgagee against the vendee. Cope v. Romeyne, 4 McLean, 384 (1848).

[34] Burnside v. Twitchell, 43 N. H., 390 (1861). See, also, Boydell v. McMichael, 3 Tyrwh., 974 (1834); s. c., 1 Cr. M. & R., 177; 3 L. J. (N. S.), Exch., 264; Hitchman v. Walton, 4 M. & W., 409 (1838); s. c., 8 L. J. (N. S.), Exch., 31. [See, *ante*, p. *47. Gill v. Weston, 110 Pa. St., 312, 317 (1885); Mann v. English, 38 Up. Can. Q. B., 240, 250 (1875); see, also, Brown v. Brookfield, 24 Nova S., 476 (1892).]

[A mortgagee, after condition broken, can bring trover for turf removed by the mortgagor without license. Wilbur v. Moulton, 127 Mass., 509, 510 (1879).]

[Where a mortgagor in possession after condition broken, cuts and sells timber without objection from the administrator of the mortgagee who sees what is being done, the latter is estopped from bringing trover against the purchaser. McKellop v. Jackman, 50 Vt., 57, 62 (1877).]

Aliter, where the mortgage is considered only as a security. See Peterson v. Clark, 15 John., 205 (1818). [See, *ante*, p. *49. Robbins v. Sackett, 23 Kan., 301, 304 (1880). See Reynolds v. Deckman, 2 Can. Law T., 261 (Nova S., 1882).]

[A mortgagee can bring trover for timber or other fixtures wrongfully removed; but where the mortgagor is allowed to retain possession, the assent of the mortgagee to such removal will be implied where the security is not impaired and it is good husbandry. Searle v. Sawyer, 127 Mass., 491 (1879).]

[Where, after a contract of sale of land, the vendee taking possession, the vendor mortgaged the land, it was held that the vendor, and not the mortgagee who had not taken possession, was the proper party to bring an action for a dwelling-house placed upon the land by the vendee and removed by him. Reynolds v. Deckman, 2 Nova S. L. R., 459 (1881).]

[Where a house is removed from land, becoming personal property, and remains for two years in the undisturbed possession of one believing the house to be his, the statute of limitations makes such house his. Robbins v. Sackett, 23 Kan., 301, 305 (1880).]

[35] Dalton v. Whittem, 3 Q. B., 961 (1842); Clarke v. Holford, 2 C. & K., 540 (1848).

tion as goods and chattels; and the plaintiff does not thereby waive his right of maintaining the illegality of the distress on the ground that fixtures cannot be distrained for rent; the landlord cannot commit the wrong of severing fixtures from the realty, and then take advantage of such wrong and treat them as goods and chattels for the purpose of distress.[36] So, a tenant or his vendee has during the term a sufficient interest in the fixtures to entitle him to maintain trover against a third [*432] *party who wrongfully removes and converts them, although at the end of the term he may be bound to leave them for the use of the landlord.[37] And if a house be blown down and a stranger takes away the timber, the lessee for life or for years may bring trover; for he has a special property to make use of the same for the purpose of rebuilding, though the general property be in the reversioner.[38] The case would be otherwise, however, where the tenant wrongfully pulls down houses or fells timber, for in that case the lessor shall have the same.[39]

Under an agreement for the sale of land, the payment of the purchase money and the execution of the deed being concurrent acts to be done in the future, the vendee acquires an equitable interest and the right to specific performance upon payment made; but not having the legal title nor the possession he cannot maintain trover for an intermediate removal of fixtures by the vendor; for at the time of the conversion he must have had property in the chattels, general or special, and possession or the right to immediate possession; and a demand of the fixtures prior to the time for completing the agreement and delivery of possession of the premises being evidence of conversion only, but not of property, will not help the matter.[40]

[36] Dalton v. Whittem, 3 Q. B., 961 (1842).

[37] Boydell v. McMichael, 3 Tyrwh., 974, 979 (1834), per Parke, B.; s. c., 1 Cr. M. & R., 177; Hitchman v. Walton, 4 M. & W., 409, 416 (1838); s. c., 8 L. J. (N. S.), Exch., 31.

[38] See Bull. N. P., 33; Per Powel, J., on Midland Circuit, Salk. MSS., Bowles's Case, 11 Co., 82 a (1615); Liford's Case, 11 Co., 48 a (1614). [See, *ante*, p. *50.]

[39] Bowles's Case, 11 Co., 81 b (1615). [See, *ante*, p. *49.]

[40] Tabor v. Robinson, 36 Barb., 483 (1862).

But in an action upon bonds given for the purchase money of land, the defendant may set up by way of recoupment, damages for the removal and conversion of fixtures without his knowledge or consent, after the contract

But where the plaintiff under license from the owner of the soil to search for tin ore, had in searching for that mineral made certain excavations in the soil, and the defendant carted away some of the soil so thrown out, the plaintiff not having abandoned his right to search the soil so thrown out, for ore, *in trover for the soil so removed it was held that the [*433] plaintiff had as against the defendant, a mere wrong-doer, a sufficient possessory title to the mass thrown out to maintain the action.[41]

As was observed in a preceding section with reference to the action of replevin, trover is not the proper form of action to try the title to land; and hence it does not lie by one who has the right of possession, and who might recover in ejectment, against one in the actual adverse possession of the land setting up title to it, to recover the value of fixtures, stone, gravel, etc., removed from the land by such party in possession.[42] Neither can the

of sale and before a formal transfer of the land and the execution of the bonds. Grand Lodge v. Knox, 20 Mo., 433 (1855).

[One holding the legal title to land can not maintain trover for hay and apples severed by a tenant of a party who has a contract for the purchase of the land, as long as the latter remains in possession. Look v. Norton, 94 Me., 547, 550 (1901).]

[A purchaser of real estate at execution sale, can maintain an action for the conversion of logs from timber cut therefrom between the time of sale and the expiration of the period of redemption. Whitney v. Huntington, 34 Minn., 458, 461 (1886).]

[41] Northam v. Bowden, 11 Exch., 70 (1855); s. c., 24 L. J., Exch., 237 (1855).

Where the plaintiffs were possessed of a wharf on the Thames, in front of which about twenty years before a pile of wood had been driven into the bed of the river by the then occupiers of the wharf, the plaintiff's predecessors, and had remained there without interruption from the Crown or conservators of the river, and was necessary to the enjoyment of the wharf. *Held*, that these were circumstances from which the court could properly draw the inference that the pile was not so placed with a view of its permanent annexation to the freehold so as to become a part thereof, but that it was placed there by virtue of an easement granted by the Crown or whoever had a right to grant it, and that there was a sufficient possession in plaintiffs to entitle them to maintain an action against defendants for negligently running against it and removing it. Lancaster v. Eve, 5 C. B. (N. S.), 717 (1859); s. c., 28 L. J., C. P., 235; 5 Jur. (N. S.), 683.

[42] Mather v. Trinity Church, 3 S. & R., 509 (1817). See, also, *ante*, § 3, p. *417; Hutchins v. King, 1 Wall., 53 (1863).

rightful owner of land maintain trover for corn, fodder, or other crops raised on the land by one in adverse possession and severed while the defendant was in possession, his remedy in such case being by an action for the mesne profits;[43] but on the other hand the party raising and severing the crops under such circumstances may maintain trover against the owner of the land for their conversion by him.[44]

With respect to what amounts to a conversion sufficient to maintain the action, it is to be observed, that, in general, the mere act of severing a fixture (which only converts it into [*434] *personalty), is insufficient;[45] and that, in order to constitute a conversion, which is the gist of this action, there must be a subsequent asportation or some unlawful assumption of dominion over the thing severed for the benefit of the party making the severance or some person other than the owner thereof, or in defiance or exclusion of the owner's right.[46]

[43] Brothers v. Hurdle, 10 Ired. Law, 490 (1849). [Harrison v. Hoff, 102 N. C., 126, 128 (1889).]

[Trover can not be maintained, after recovery of land, for timber cut and carried away by the defendant pending the suit. Gardner v. Peckham, 13 R. I., 102, 104 (1880).]

[44] Branch v. Morrison, 5 Jones' Law, 16 (1857); s. c., 6 Id., 16.

[45] See Addison on Torts, § 467; Houghton v. Butler, 4 Term, 364 (1791); Bristol v. Burt, 7 John., 254 (1810); Big. Lead. Cas. on Torts, 389, *et seq.* See, also, Beck v. Denbigh, 8 C. B. (N. S.), 888 (1860); s. c., 6 Jur. (N. S.), 998; 29 L. J., C. P., 273. [American Telegraph Co. v. Middleton, 80 N. Y., 408, 411 (1880); see, also, Greenebaum v. Taylor, 102 Cal., 624, 627 (1894).]

[46] See Ferard Fixt., 295; Addison on Torts, § 467; Houghton v. Butler, 4 Term, 364 (1791). [See Fresno Bank v. Husted, 49 Pac., 195, 197 (Cal., 1897).]

[Where the superintendent of a poor-house, under direction of the selectmen of the town, removed a fence located upon the land of the town by the adjoining landowner, and, in so doing, carried away a section of fence belonging to the adjoining landowner, this amounts to conversion whether the property was afterwards wrongfully detained or not. Smith v. Colby, 67 Me., 169 (1878).]

[Where a sheriff levies upon fixtures, and follows all the legal forms to make the lien effective, and then sells the fixtures, it constitutes conversion. Scudder v. Anderson, 54 Mich., 122, 124 (1884).]

[If the owner of a factory to which is attached a water-wheel and shafting, which another person has the right to remove, refuses to return them when demanded, this might not be conversion, as it is not the duty of the

Since, however, trover lies only for the conversion of personal chattels, it is well settled that the action cannot be maintained for the recovery of fixtures so long as they are annexed to and constitute a part of the realty;[47] though in

landowner to take out the property; but when a claim of ownership accompanies the refusal, it amounts to an appropriation of the property. And where such right of removal results from a reservation in a deed conveying a starch factory, and no time is fixed for the removal, the statute of limitations does not begin to run until a claim of title thereto is made by the landowner. Straw v. Straw, 70 Vt., 240, 243 (1897).]

[It is not necessary, to render one liable in trespass or trover, that there should be an appropriation of the thing to the party's own use or beneficial enjoyment. The disposing or assuming to dispose of another man's goods, without his authority, is a conversion of them. Thus, a wrongful attachment and sale of a growing crop without further intermeddling therewith, is a conversion thereof. Mead v. Thompson, 78 Ill., 62, 64 (1875).]

[47] *Ex parte* Quincy, 1 Atk., 478 (1750), per Lord Hardwicke; Roffey (or Ruffey) v. Henderson, 17 Q. B., 574 (1851); s. c., 16 Jur., 84; 21 L. J., Q. B., 49; Colegrave v. Dias Santos, 2 B. & C., 76 (1823); Longstaff v. Meagoe, 2 Ad. & E., 167 (1834); Raddin v. Arnold, 116 Mass., 270 (1874); Guthrie v. Jones, 108 Mass., 191 (1871); Prescott v. Wells, 3 Nev., 82 (1867); Pierce v. Goddard, 22 Pick., 559 (1839); Overton v. Williston, 31 Penn. St., 155 (1858). See, also, Lee v. Risdon, 7 Taunt., 188 (1816); Beck v. Denbigh, 8 C. B. (N. S.), 888 (1860); s. c., 6 Jur. (N. S.), 998; 29 L. J., C. P., 273; 8 W. R., 392; 2 L. T. (N. S.), 154; Richardson v. Copeland, 6 Gray, 536 (1856); Clary v. Owen, 15 Gray, 522 (1860). [Dewitz v. Shoeneman, 82 Ill. App., 378, 379 (1899); Leman v. Best, 30 Ill. App., 323, 325 (1888); Hopewell Mills v. Taunton Bank, 150 Mass., 519, 523 (1890); Detroit & Bay City R. R. Co. v. Busch, 43 Mich., 571 (1880); Morrison v. Berry, 42 Mich., 389, 394 (1880); Geirke v. Schwartz, 45 N. Y. Supp., 928, 929 (1897); Darrah v. Baird, 101 Pa. St., 265, 272 (1882), aff'g 12 Pitts. Leg. J., 240 (1882); Oates v. Cameron, 7 Up. Can. Q. B., 228; Bunnell v. Tupper, 10 Up. Can. Q. B., 414, 422; see, also, Doran v. Willard, 14 N. Brunsw., 358 (1873).]

[Bricks and rails were upon land at the time it was sold upon execution. Afterwards a tenant used the bricks to build a chimney, and the rails to build a fence. *Held*, that an action of trover could not be maintained for the brick and rails while annexed, since that action lies only for the conversion of personal chattels. Thweat v. Stamps, 67 Ala., 96, 98 (1880).]

[Where the owner of a lot gave permission for a house to be moved thereon, and refused to allow it to be removed, but had no possession of it while in transitu, he is not guilty of conversion. Northrup v. Trask, 39 Wis., 515 (1876).]

[Trover lies for a cotton-screw although a permanent fixture, if the defendant had detached it from the plaintiff's realty and moved and affixed

some cases, where tenant's fixtures removable as against the landlord were considered by the court as personalty, the rule has been understood to be otherwise.[48] Neither a tenant nor

it to his own, as, when detached, it became that thing for which trover would lie, and the conversion was complete at that moment, and the right of action then arose, and this right could not be defeated by the defendant's fastening this chattel to his own real estate. Woods v. McCall, 67 Ga., 506, 507 (1881).]

[48] See Moore v. Wood, 12 Abb. Pr., 393 (1860), where the property in dispute consisted of shafting, belts, pulleys, and a brick chimney sunk three feet into the ground for a foundation and piercing the roof, all which were put on the demised premises by a tenant for the purpose of his business, and for a refusal on the part of the landlord to allow the tenant to remove which upon his being dispossessed of the premises, the landlord was held liable, as constituting a conversion, though the property was still unsevered from the realty; Villas v. Mason, 25 Wis., 310, 327 (1870); Miller v. Baker, 1 Met., 27 (1840), trees, shrubs, etc., planted by a tenant; Peck v. Knox, 1 Sweeney, 311 (1869); Finney v. Watkins, 13 Mo., 291 (1850), where the property in question was a hydraulic press used by a tallow chandler, put into a hole in the ground walled up with solid masonry, the bottom of the cylinder resting on flanges on the stone wall even with the floor, but not otherwise attached to the wall than by resting on it, and the part of the press composed of plank around the cylinder being nailed to the floor and braced to steady the press, which was allowed to be recovered in trover by the vendee of the tenant as against the landlord, who had got into possession of it and the premises without plaintiff's consent, and refused to deliver it up.

All these cases were decided on the ground that as between landlord and tenant fixtures removable by the tenant are personal property, from which the conclusion that trover lies follows naturally enough. The cases seem, however, open to the criticism that their assumed premises are incorrect and opposed to the weight of authority. See the cases already cited and those cited *post* in this chapter.

Between the cases of Wansbrough v. Maton, 4 Ad. & E., 884 (1836); s. c., 6 N. & M., 367; 2 H. & W., 37; 4 L. J. (N. S.), K. B., 154; 5 Id., 150 (the case of a wooden barn built by a tenant and resting by its weight alone on staddles); Wittshear v. Cottrell, 1 El. & Bl., 674 (1853); s. c., 22 L. J., Q. B., 177; 17 Jur., 758; 18 Eng. L. & Eq., 142 (a granary likewise resting on staddles); Davis v. Jones, 2 B. & Ald., 165 (1818), (where parts of a machine called jibs, put up by a tenant, and fastened by pins upon caps and steps, were held recoverable in trover), and the cases cited to sustain the text, there is no conflict; because these cases proceed upon the ground that the things which were the subjects of the actions were not fixtures at all, but mere personal chattels. See Minshall v. Lloyd, 2 M. & W., 460 (1837), per Parke, B.

[In the following cases trover was allowed for removable fixtures: Upde-

*his assignee can maintain trover against the landlord, [*435] or an incoming tenant, for the recovery of fixtures left by him annexed to the demised premises after the expiration of the tenancy.[1] But where a lessee mortgaged his tenant's fixtures and afterwards surrendered his lease to the lessor who granted a new lease to a third person who refused to deliver up the fixtures to the mortgagees, it was held that the mortgagees might maintain an action against the defendant for preventing them from exercising their right to sever, and in such action recover the value of the fixtures, as severed.[2] Neither can a *tenant, even during his term, maintain trover for fix- [*436] tures while annexed to the freehold.[3]

graff v. Lesem, 15 Colo. App., 297; Shapira v. Barney, 30 Minn., 59 (1882); Smusch v. Kohn, 49 N. Y. Supp., 176, 178 (1898); Thorn v. Sutherland, 123 N. Y., 236, 240 (1890); Rosenau v. Syring, 25 Ore., 386, 390 (1894); Watts v. Lehman, 107 Pa. St., 106, 112 (1884); see, also, Broaddus v. Smith, 121 Ala., 335, 339 (1898); Sattler v. Opperman, 30 Pitts. Leg. J., 205 (1900); and *ante*, p. *408.]

[1] Lyde v. Russell, 1 B. & Ad., 394 (1830); Minshall v. Lloyd, 2 M. & W., 450 (1837); Wilde v. Waters, 16 C. B., 637 (1855); s. c., 24 L. J., C. P., 193; 1 Jur. (N. S.), 1021; 3 W. R., 570; 32 Eng. L. & Eq., 422; Roffey or (Ruffey) v. Henderson, 17 Q. B., 574 (1851); Davis v. Buffum, 51 Me., 160 (1863); Stockwell v. Marks, 17 Me., 455 (1840); Preston v. Briggs, 16 Vt., 129 (1844), per Redfield, J.; *Ex parte* Reynal, 2 M. D. & DeG., 461 (1841), per Holroyd, Com'r. [Donnelly v. Thieben, 9 Ill. App., 495, 499 (1881); Walsh v. Sichler, 20 Mo. App., 374, 379 (1886).]

Neither in such a case can he maintain trover therefor after the landlord has severed them from the freehold. Lyde v. Russell (*supra*).

[The acceptance of the keys and possession of a building by the lessor does not constitute a conversion of the fixtures therein. Felcher v. McMillan, 103 Mich., 494, 500 (1894).]

[2] London, etc., Loan & Discount Co. v. Drake, 6 C. B. (N. S.), 798 (1859); s. c., 5 Jur. (N. S.), 1407; 28 L. J., C. P., 297.

[If the mortgagee of a boiler, upon his attempting to remove it, is forbidden to do so by those in possession of the premises, that constitutes a conversion of the property without any demand being made. Badger v. Batavia Paper Mfg. Co., 70 Ill., 302, 305 (1873).]

[3] Mackintosh v. Trotter, 3 M. & W., 184 (1838).

[There can be no conversion of fixtures by a landlord while the tenant is in possession of and using them, although the latter has been enjoined from removing same. Felcher v. McMillan, 103 Mich., 494, 500 (1894).]

[While a lessee of land remains in possession thereof and of a house which he built and has a right to remove, he can not maintain an action

But the above remarks do not apply to articles which are in their nature furniture merely, which though fastened to the walls for safety or convenience do not lose their character as personal chattels and become a part of the realty; and hence for such articles trover will lie after demand therefor made by the tenant of the landlord and refusal, though they are still attached to the walls and have not been disannexed by the landlord.[4] It seems also well settled that trover lies in behalf of the rightful owner for the conversion of a house or other structure built on the land of another with his consent or under an agreement express or implied that it shall continue personalty, if averred and proved to be personal property, notwithstanding it has not actually been severed from the land whereon it was erected.[5] And in such a case, the thing in question being already

for the conversion of the house although his lessor sold the lots, and the vendee exacts a much higher rent. Heighes v. Dollarville Co., 113 Mich., 518, 519 (1897).]

[4] Guthrie v. Jones, 108 Mass., 191 (1871). The articles in question which were in this case considered furniture, were a glass case, a case of drawers, and a mirror about six feet long by two feet wide, bought by the tenant of an eating house where intoxicating liquors were sold to use in his business, and screwed or nailed by him to the walls, and gas-fixtures (so called) bought by him for the same purpose and screwed upon the gas-pipes fastened to the ceiling. But in the same case two counters, called respectively an oyster and trench counter, and a bar, both brought into the room entire and fastened to the floor by nails and with iron knees, though removable trade fixtures, were held to have lost their character as movable chattels, while thus attached, and hence not to be the subjects of trover. See, also, Duke of Buckingham v. Lord Pembroke, 3 Keb., 74 (1683). [Smusch v. Kohn, 49 N. Y. Supp., 176, 178 (1898); see, also, Morrow v. Burney, 2 Ind. Ter., 440, 443 (1899); and *ante*, p. *78.]

[Where a tenant voluntarily surrenders possession, and then demands possession of fixtures, the landlord is entitled to reasonable time to make reply before being guilty of conversion. In this case a reply within twenty-four hours, Sunday excepted, was held reasonable, although one was promised the same day. Felcher v. McMillan, 103 Mich., 494, 500 (1894).]

[5] Davis v. Taylor, 41 Ill., 405 (1866); Hinckley v. Baxter, 13 Allen, 139 (1866); Russell v. Richards, 10 Me., 429 (1833); s. c., 11 Id., 371 (1834); Osgood v. Howard, 6 Id., 452 (1830); Hilbourne v. Brown, 12 Id., 162 (1835); Pullen v. Bell, 40 Id., 314 (1855); Adams v. Goddard, 48 Me., 212 (1859); 39 Id., 144; Tift v. Horton, 53 N. Y., 377 (1873); Smith v. Benson, 1 Hill, 176 (1841); Ring v. Billings, 51 Ill., 475 (1869), where the things in dispute were wine plants. [Watertown Steam Engine Co. v. Davis, 5 Houston, 192, 204 (Del., 1877); Walker v. Schindel, 58 Md., 360, 369

personal property, actual severance and asportation are unnecessary in order to constitute a conversion, and the question as to whether or not there has been a conversion *of [*437] the thing in controversy, is to be determined by the general rules of law applicable to that question, which, the scope of this work forbidding, will not be here considered.[1]

(1882); Korbe v. Barbour, 130 Mass., 255, 259 (1881); Dolliver v. Ela, 128 Mass., 557, 559 (1880); Stout v. Stoppel, 30 Minn., 56, 58 (1882); Lewis v. Ocean Pier Co., 125 N. Y., 341, 352 (1891); see, also, Griffin v. Ransdell, 71 Ind., 440, 441 (1880); Seidel v. Cornwall, 166 Mo., 51, 55 (1901); Walker v. Grand Rapids Mill Co., 70 Wis., 92 (1887).]

See, however, Prescott v. Wells, 3 Nev., 82, 90 (1867); Raddin v. Arnold, 116 Mass., 270 (1874).

[Where the opposing parties in a suit concerning a building, have each treated it as personal property, and where neither would have any interest therein unless it was personal property, and there is no evidence showing it to be real property, it is error for a trial court to nonsuit the plaintiff in an action for conversion, on the ground that the building is real property. Wheeler v. McFerron, 33 Ore., 22, 25 (1898). See Hughes v. Edisto Shingle Co., 51 S. C., 1, 30 (1897).]

[Where an action of trover was brought for a "three-story frame flat-roof dwelling-house, twenty-five feet front by forty feet deep," which the plaintiff avers was personal property, and that the building was erected by one by permission upon the land of another, a demurrer, that the structure was real estate, can not be sustained, as that fact is capable of trial by jury, and should be pleaded. Under the facts presented, there is no inevitable presumption that the house was realty. Pope v. Skinkle, 45 N. J. Law, 39 (1883). But recovery for the conversion of a house built upon the land of another, can not be had if no circumstances are shown which would make the house a personal chattel. Ekstrom v. Hall, 90 Me., 186, 192 (1897).]

[Where a water-wheel and shafting in a starch-factory, which are so attached as to be a part of the realty, are reserved in a deed conveying the factory, it is a severance of them in law, and they may be recovered by the grantor as personal chattels in an action of trover. Straw v. Straw, 70 Vt., 240, 242 (1897).]

[See Harris v. Powers, 57 Ala., 139, 144 (1876), which was an action of trover for a house. A count in case may be joined for a denial of the privilege to remove.]

[1] See the cases cited in next note (*supra*), for illustrations of what has been held to be a conversion in the absence of severance and asportation. See, also, Parker v. Goddard, 39 Me., 144 (1855); 48 Id., 212; Dame v. Dame, 38 N. H., 433 (1859); Beardsley v. Sherman, 1 Daly, 325 (1863); Davis v. Buffum, 51 Me., 160 (1863); Wansbrough v. Maton, 4 Ad. & E., 884 (1836); s. c., 6 N. & M., 367; 2 H. & W., 37. [Thweat v. Stamps,

As respects the pleadings in this form of action, if the declaration shows that the plaintiff was possessed of the things in dispute, *ut de bonis propriis*, it is sufficient, though the things named are things which seem annexed to the freehold; for that will not be intended when they are named *de bonis propriis*.[2] Thus, in Wood v. Smith, the declaration alleged that the plaintiff was possessed *ut de bonis propriis*, of a portal with hinges, a hand-mill, a lead, and a washing-fat, and lost them, etc.; to which defendant pleaded not guilty; and after verdict for plaintiff, it was moved in arrest of judgment that these things appeared to be fixed to the house, were as parcel thereof, and not accounted as goods, and therefore the action did not lie for them; for, as it was argued, the portal was the door of the house, and the hand-mill and the lead (which was a brewing lead), and

67 Ala., 96, 98 (1880); Leman v. Best, 30 Ill. App., 323, 326 (1888); Dolliver v. Ela, 128 Mass., 557, 560 (1880); Edmundson v. Bric, 136 Mass., 189, 191 (1883); Ingersoll v. Barnes, 47 Mich., 104, 107; Neiswanger v. Squier, 73 Mo., 192, 198 (1880); Stackpole v. Eastern R. R., 62 N. H., 493, 495 (1883); Snow v. Perkins, 60 N. H., 493, 495 (1881); Johnston v. Ross, 22 App. Div., 631 (N. Y., 1897); Waller v. Bowling, 108 N. C., 289 (1891); Vulcan Iron Co. v. Rapid City Elevator Co., 9 Man., 577, 582 (1894); see, also, Chalifoux v. Potter, 113 Ala., 215 (1896); Carper v. Risdon, 76 Pac., 744, 746 (Colo. App., 1904); Heighes v. Dollarville Co., 113 Mich., 518, 519 (1897); Wilson v. Cummings, 53 N. Y. St. R., 584 (1893); Allen v. Dent, 72 Tenn., 676 (1880); Argles v. McMath, 26 Ont., 224, 247 (1895), aff'd 23 Ont. App., 44, 47 (1896); Polson v. Degeer, 12 Ont., 275 (1886).]

[Where a tenant built a corn-crib for his own use upon the demised farm, with the express understanding that, when he left the place, he could take the lumber with him or be paid for it, he cannot recover its value in the absence of evidence showing a refusal to permit the removal of the lumber or that a demand was made for it. Jared v. Vanvleet, 13 Ill. App., 334, 336 (1883).]

[2] Wood v. Smith, Cro. Jac., 129 (1606); Com. Dig., Action upon the Case, Trover, G 1; Davis v. Taylor, 41 Ill., 407 (1866), where the subject of the action was a house which was described in the declaration as goods and chattels. See, also, Campbell v. O'Neill, 64 Pa. St., 290 (1870); Earl of Bedford v. Smith, Dy., 108b (1690); Kimpton v. Eve, 2 Ves. & Bea., 349 (1813); Niblet v. Smith, 4 Term, 504 (1792).

See, however, Pyot v. St. John, Cro. Jac., 329 (1609), where a shelf not alleged to be fixed was, on error brought, intended to be so. So in Anon., 2 Vent., 214 (1690), as to a rack in a stable. In these cases, however, the action was covenant, and the declaration did not contain the words *ut de bonis propriis*.

the washing-fat (which was parcel of the brewing vessels) were always fixed things going to the heir and not to the executor. *Sed non allocatur;* for it was alleged in the declaration, that the plaintiff was possessed of them *ut de bonis propriis;* and it might be that those things were severed from the freehold, and things lying by; and it shall be *so intended when the plaintiff [*438] so declares; and the contrary appears not to the court by any matters shown to them by the defendant's plea.

And, where the declaration in trover was for "goods, chattels and fixtures," and a verdict was found for the plaintiffs on the whole declaration with general damages; upon a motion in arrest of judgment it was held by the Court of Exchequer that, though, if it had clearly appeared that the plaintiff meant to sue in respect of fixtures properly so called—things affixed to the freehold—the declaration after such assessment of general damages would have been bad, yet, since after verdict every reasonable intendment ought to be made in favor of the declaration, and since the word "fixtures" does not necessarily import things affixed to the freehold, but only means something fixed to another, and since every article enumerated in the declaration might be a purely movable chattel, the word ought to be understood in such a sense as would support the declaration, and that it must be presumed that the judge who tried the cause would not have directed the jury to find, and that the jury would not have found, damages for the articles claimed under the name of fixtures, if it was improper that damages should be given in respect to them; and the verdict having been found generally, the things in question must be intended to have been fixtures attached to other things which were in themselves movable.[1]

[1] Sheen v. Rickie, 5 M. & W., 175 (1839); s. c., 7 Dowl. Pr., 335. See, also, Carr v. Burdiss, 5 Tyr., 309 (1835); Baldwin v. Walker, 21 Conn., 168 (1851), where in referring to machinery in a factory, it was stated that where not shown to be personalty it may as well be presumed to be a part of the building as otherwise. [See Meyers v. Marsh, 2 Up. Can., Q. B., 185.]

[In Updegraff v. Lesem, 15 Colo. App., 297, 301 (1900), a change of venue was asked by the defendant on the theory that the suit was brought for the determination of some kind of interest in real estate; but his motion was overruled. The complaint was framed upon the hypothesis that the articles were personal property; if they had been incorporated

A question has also been made in relation to this action, as well as the action of trespass *de bonis asportatis*, whether trover can be maintained in a case where the severance and removal are one continuous and entire act; and the better opinion seems to be that the action lies, notwithstanding such entirety.[2]

into real estate there could be no recovery. But in Darrah v. Baird, 101 Pa. St., 265 (1882), it was said that trover does not lie for fixtures *eo nomine*. While they remain attached they are a part of the freehold.]

[2] See *ante* § 4.

Mr. Ferard in his work on Fixtures (page 299), thus discusses this subject: "There does not appear to be any case in which this question has been discussed with reference to the doctrine of fixtures; but it seems to have arisen incidentally in respect of the cutting down and carrying away of timber.

"In 2 Rolle's Ab., 119, tit. *Maeresme*, it is laid down, that if lessee for life or years cuts timber trees, and immediately barks them and carries them away, yet they belong to the lessor who has the inheritance; for they are parcel of the inheritance; and the lessor may have trover and conversion for them, although he never seizes them before the carrying them away, and that the lessee carried them away immediately after the felling and barking, so that all was but one entire act. Between Berrie & Herde, adjudged upon a special verdict in B. R. This case of Berry v. Heard is found in several of the books of reports, and is stated in a manner somewhat differently in each of them (*a*). It established a principle which had been for a long time doubted, viz., that a landlord has such a possession of timber cut down during the continuance of a lease, that he could maintain trover for it; because the lessee has only an interest in it while it was growing, and which determined the instant it was cut down. This was, in fact, the principal question raised in the case, and the observations of the court are for the most part applied to this point. It appears, however, from a reference to the case, that the court did also take into consideration the objection as to the cutting and carrying away of the trees being one continued act. For they advert to the rule of law, that in criminal cases such a taking would be no felony; and, according to the report of the case in Palmer, Mr. Just. Doddridge is said to have remarked, that in respect of the barking of the tree, there must have been an interval between it and the cutting down of the tree (*b*).

"There is another case, Udal v. Udal (*c*), in which the same point arose, and which has been mentioned on a former occasion. In the discussion of that case, it is said to have been agreed by the court, that an action of trespass *vi et armis* would lie against a lessee for the taking and carrying away

(*a*) Palm., 327; Sir W. Jones, 255; Bend., 141; Cro. Car.. 242.

(*b*) And see, per Houghton, J., in the same report.

(*c*) Aleyn, 82.

*Although the actions of trover and trespass *de bonis* [*439] *asportatis* are for the most part concurrent remedies, trover is in some respects more extensive in its application than trespass *de bonis*, and may in some cases be maintained where [*440] the latter does not lie. Thus, where the sheriff upon a writ of extent seized a furnace fixed to the land, and sold and delivered it to a third person, an action of trespass was held not to lie against such purchaser, because, although the sheriff could not lawfully sell it, it being fixed to the land, yet it came into the

of trees, if the same be not as one continued act. The case itself was an action of trover, and the effect of the decision, according to the note in Comyn's Digest, *Biens*, H, was, that a lessor may maintain trover for the bark of trees cut, although they are carried away or converted at the time of cutting, or afterwards. It is observable, that in the judgment of this case, the above mentioned decision of Berry v. Heard was referred to by the court, and in terms which in substance correspond with the abridgement of it given by Rolle.

"There is also a further case, which may, perhaps, deserve to be noticed in reference to this subject. In Noy's Rep., 125, in the case of Sir Jos. Skidnes v. Huson, it was determined, that if a stranger enters my close and cuts my trees and carries them away I may have trover, although that after the cutting and before the carrying away I could not claim them, and no actual possession in me. The decision of this case, however, seems rather to turn upon the right of property in the trees, than upon the form of action, or the nature of the injury complained of. Since the determination of these early cases, the point does not appear to have been the subject of legal discussion. It was, however, adverted to by the Court of Common Pleas on one occasion. For, in the case of Clark v. Calvert (*a*), Chief Justice Dallas is reported to have proposed the question, whether an action of trover could be maintained for trees cut down and carried away at the same time? In criminal law, indeed, it is a clearly established rule that there must be an interval between the severance and removal of a thing to make the taking of it a felony. But the principle upon which this rule proceeds in criminal cases, seems in some essential particulars to be inapplicable to proceedings of a civil nature. Perhaps the subsequent detention of the article in a chattel state may be thought to amount to a conversion, for which an action of trover might be sustained. And at all events, a very short interval between the acts of severing and taking away the fixture, would be sufficient to remove an objection so very technical in its nature. And, in practice, it may be found a useful precaution, to make a demand of the property previous to bringing the action, because a refusal after demand would probably be deemed evidence of a new conversion."

(*a*) 3 B. Moore, 107. And see Davis v. Connop, 1 Price, 53.

defendant's possession without any wrong on his part;[1] for, as was observed by the court in the case just cited, if a stranger takes my horse, and sells him, a trespass will not lie against the vendee, but a detinue. But if one sells my horse, and a stranger [*441] takes him, he is a trespasser. In this case *an action of trover could probably have been maintained for the recovery of the value of the furnace without any demand thereof and refusal,[2] and very clearly after demand and refusal.

As respects the measure of damages in the action of trover for the conversion of fixtures wrongfully severed, it is well settled that the value of the fixtures in their severed state only, as chattels, can be recovered, and not their value in an affixed state, or as the same would be estimated between an incoming and an outgoing tenant.[3]

[An action was brought in New York for maliciously cutting down and converting telegraph poles in New Jersey. *Held,* that the plaintiff could not recover, as the poles were realty, and the remedy should be trespass *quare clausum fregit,* which is not transitory; nor could recovery be had on the ground that the severed poles became personalty, as the cutting and removal was one continuous transaction. American Telegraph Co. v. Middleton, 80 N. Y., 408, 411 (1880).]

[1] Day v. Austin, Owen, 70 (1595); 2 Roll. Abr., Tresp., p. 556, pl. 18; Bro. Abr. Tresp., pl. 48.

See, however, the case above cited, under the name of Day v. Bisbitch, as reported in Cro. Eliz., 374, where, as to the point that the action lay not against the defendant, because he had the thing by delivery of another and not by his own taking, it is said that the matter was not much insisted upon, because he was present and took it, and so was an immediate trespasser.

[A sheriff levied upon all right of, in and to a leasehold interest in land, "on which is erected a stationary steam saw mill, with engine and boiler," etc., and subsequently sold the leasehold interest "with the improvements," but did not disturb nor pretend to take manual possession of the premises. An action of trespass was brought against him by one who had bought the saw mill prior to the levy. *Held,* that the sheriff was not liable, as the property sold was an interest in realty, and he had never taken the fixtures into his personal custody. Kile v. Giebner 114 Pa. St., 381 (1886).]

[2] See Riley v. Boston Water Power Co., 11 Cush., 11 (1853); Farrant v. Thompson, 2 D. & R., 1 (1822); s. c., 5 B. & Ald., 826.

[3] Clarke v. Holford, 2 C. & K., 540 (1848); McGregor v. High, 21 L. T. (N. S.), 803 (1870); Moore v. Wood, 12 Abb. Pr., 393 (1860). The articles in question in Moore v. Wood, were a brick chimney that could not be removed without being taken down, and machinery; and the measure of

VI. Ejectment.

At common law this action does not lie for anything whereon an entry can not be made, or of which the sheriff can not deliver possession; or, in other words, it is maintainable only for corporeal hereditaments.[4] But at the common law where the owner of land recovers it in ejectment, the improvements and fixtures thereon, forming a parcel of the land, pass by virtue of such recovery to such owner, as a part thereof; and the owner of the land is as much entitled to recover the fixtures so forming part of the land, as he is the *corpus* of the estate itself.[5] In like

damages was held to be the value for purposes of removal, which in the case of the chimney was the value of the material, subject to the obligation to remove it, with interest thereon. [Walker v. Schindel, 58 Md., 360, 371 (1882); Seibel v. Siemon, 72 Mo., 526 (1880); Barff v. Probyn (1895), 64 L. J., Q. B., 557, 560).]

See, also, Hitchman v. Walton, 4 M. & W., 409 (1838); Cook v. Champlain Transportation Co., 1 Den., 102 (1845). [Waller v. Bowling, 108 N. C., 289 (1891); Seibel v. Siemon, 5 Mo. App., 303 (1878). But see Greenebaum v. Taylor, 102 Cal., 624, 627 (1894).]

[Under the Code, § 3564, the measure of damages in trover for a cotton screw detached from the plaintiff's land by the defendant, and affixed to the land of the latter, is the value of the screw with a reasonable addition for its hire or use, this being precisely what was lost by the wrongful conversion. Woods v. McCall, 67 Ga., 506, 507 (1881).]

[Where a landlord wrongfully refuses to permit the removal of a building, the measure of damages is its worth to the landlord, being the sum it enhances the value of the lot, and not what the value of the building would be to the tenant. Neiswanger v. Squier, 73 Mo., 192, 199 (1880).]

[4] Adam's Eject., 18 *et seq;* Jackson v. Buel, 9 John., 298 (1812); Black v. Hepburne, 2 Yeates, 331 (1798); Den. *ex dem.* Farley v. Craig, 15 N. J. Law, 191 (1836).

[5] McMinn v. Mayes, 4 Cal., 209 (1854); Blackw. Tax Titles, *587. [See, *ante,* p. *57. Haggin v. Clark, 51 Cal., 112, 116 (1875); Anderson v. Reid, 14 App., D. C., 54 (1899); Kanoii v. Kaioipahia, 11 Haw., 326, 327 (1898); Miles v. McNaughton, 111 Mich., 350, 354 (1896); Ege v. Kille, 84 Pa. St., 333, 341 (1877); Effinger v. Hall, 81 Va., 94, 101 (1885); see, also, Doren v. Lupton, 154 Ind., 396, 399 (1899); Armstrong v. Oppenheimer, 84 Tex., 365, 368 (1892).]

[A saw-mill upon a mill-site, attached to the earth in the usual way, although separable without injury to either the land or the mill, is realty for the purpose of determining the *mesne* profits recoverable in ejectment from a trespasser who uses the mill as it stands; and he cannot insist upon a separate valuation of the site and the mill, although the mill is

[*442] manner as between the successful plain*tiff in ejectment and the evicted defendant, the crops growing upon the premises are part of the realty, and pass with the land when possession thereof is delivered by the sheriff under the writ of *habere facias possessionem*.[6] But in these cases the improvements,

not mentioned in the declaration. Morris v. Tinker, 60 Ga., 466, 472 (1878).]

[Where the unsuccessful defendant in ejectment had bought a house upon the land as personal property and united it more firmly to the land, the plaintiff cannot, while insisting upon retaining the house by virtue of his recovery of the land, escape compensation for the improvement on the ground that it never became a fixture. Zweitusch v. Watkins, 61 Wis., 615, 621 (1884).]

[A tenant was wrongfully dispossessed by his landlord, who leased the premises to another tenant, the latter erecting fixtures. Upon recovery by the first tenant, the structures erected by the second tenant became realty as to the first tenant, and subject to his lease. Wright v. Macdonell, 88 Tex., 140, 149 (1895).]

[Improvements erected by a tenant, although removable by him as against the landlord, pass; and the tenant cannot recover their value from the landlord although the latter has set off their value in reduction of the claim for mesne profits. Lanigan v. Kille, 97 Pa. St., 120, 127 (1881).]

[A heater nowise attached to the realty is not a part of a mill which a sheriff is directed to deliver under a writ of possession awarded upon judgment in an action of forcible detainer. Smith v. People, 99 Ill., 445, 448 (1881).]

[As to structures placed upon land by a railroad company, see Illinois Central R. R. Co. v. LaBlanc, 74 Miss., 650 (1897).]

As to the subject of compensation for improvements made by *bona fide* occupants, under the various "betterment," "improvement," and "occupying claimant" laws of the various States, see Blackw. Tax Titles, *587, *et seq.*, and notes.

[6] Altes v. Hinekler, 36 Ill., 275 (1864); Adam's Eject. *347, and cases there cited. [See, *ante*, pp. *64, *261 and *262. Carlise v. Killebrew, 89 Ala., 329, 332 (1889); McGinnis v. Fernandes, 32 Ill. App., 424 (1889), aff'd 135 Ill., 69 (1890); Huston v. Skaggs, 7 Ky. L. R., 592 (Super., 1886); Oyster v. Oyster, 32 Mo. App., 270 (1888); see, also, Huerstal v. Muir, 64 Cal., 450, 453 (1884); Adams v. Kauwa, 6 Hawaii, 280, 281 (1881); Hamilton Loan Co. v. Campbell, 5 Ont., 371 (1884).]

[Unsevered crops pass with land recovered in ejectment, if no rent is claimed for the year in which recovery is had. Craig v. Watson, 68 Ga., 114, 116 (1881).]

[The successful plaintiff in ejectment does not recover crops planted by a lessee before the action was commenced. Collier v. Cunningham, 2 Ind. App., 254, 262 (1891).]

fixtures, and crops pass as parcel of the land itself, and not as things distinct therefrom; and the action is believed to be applicable to the recovery of fixtures only as incidental to the recovery of the possession of the land to which they are annexed, the action itself being calculated to try the mere possessory title to real estate,[7] and not being applicable to personal chattels. But, although ejectment does not lie for the recovery of mere chattels, though in a state of annexation with the realty, where a boiler, engine and stack were erected on the land of the plaintiff at the joint expense of himself and the defendant, under an agreement recognizing their joint ownership in such erections and that they should be used as a common source of power without limitation as to time, it was held that the interests thereby created were in the nature of real estate; and that if one of the tenants in common excluded the other from the use and possession thereof, ejectment would lie to enforce the agreement.[8] So, ejectment may be maintained for "a house," "a chamber," "a part of a house," "the vestry in D," "a warehouse," "a stable," "a shop," "a cottage," "four corn-mills," without saying of what kind, "a store," etc., without any special reference to the soil beneath, these things being *prima facie* realty.[9]

[7] 3 Bl. Com., 201, 205.

[Railroad track laid by a railroad company without proper proceedings to appropriate the land, does not pass to the successful plaintiff in ejectment, as the track is not a part of the freehold. Justice v. Nesquehoning R. R. Co., 87 Pa. St., 28 (1878).]

[The word "dwelling-house" embraces the land upon which it stands, and a charge of its forcible detention is equivalent to a charge of forcible detention of the land upon which it is standing. Endsley v. State, 76 Ind., 467, 469 (1881).]

[8] Hill v. Hill, 43 Pa. St., 521 (1862).

See Paull v. Eldred, 29 Pa. St., 415 (1857). [Cassell v. Crothers, 193 Pa. St., 359 (1899).]

[9] See, generally, Mills v. Pierce, 2 N. H., 9 (1819); Hill v. Giles, Cro. Eliz., 818 (1601); Royston v. Eccleston, Cro. Jac., 654 (1623); Hammond v. Ireland, Sty., 215 (1649); Lady Dacre's Case, 1 Lev., 58 (1673); Fitzgerald v. Marshall, 1 Mod., 90 (1683); Anon., 3 Leon., 210 (1588); White v. White, 16 N. J. Law, 202 (1837); King v. Catlin, 1 Tyler, 355 (1802); Jackson v. May, 16 John., 184 (1819); Adam's Eject., 26; and the authorities therein cited. [Gilliam v. Bird, 30 N. C., 280, 284 (1848); see, also, Lange v. Baranco, 32 La. Ann., 697, 699 (1880); Dean v. Pyncheon, 3

[*443] *VII. Actions Ex Contractu.

Many of the cases that might properly be referred to in this connection have already been cited in the preceding pages of this volume in considering the right of the tenant to remove fixtures as affected by the terms of his tenancy, and other relations, where the general rules of law relating to fixtures have been qualified, restricted or enlarged by agreements upon the subject entered into by the parties in interest.[10] There are, however, some other cases that will be referred to in this connection.

Where a tenant represents that he is the owner of and sells to a sub-tenant as personal property, fixtures upon the demised premises, which by the term of his original lease are to be a part of the freehold and belong to the landlord, and to which he has no title except the right to their use, as tenant, the purchaser may recover damages for the failure of the vendor's title, and the subsequent destruction of the demised property by a third party or the forfeiture of the lease to the original lessor will not relieve the defendant from such liability.[11]

Chand., 9, 19 (Wis., 1850). See Asheville Div. S. O. T. v. Ashton, 92 N. C., 578, 587 (1885), that a third or upper story of a large brick building can be recovered in ejectment.]

[The road bed and everything attached to the soil upon which a railroad is built, are realty, for which ejectment will lie. Tennessee & Coosa R. R. Co. v. East Alabama R'y Co., 75 Ala., 516, 525 (1883).]

In a suit to recover possession of premises, defendant's answer admitted plaintiff's ownership of the lot and title to the possession, but alleged that defendant was owner of a building standing on the premises and held and occupied it by possession and license of plaintiff's grantor, and that plaintiff purchased with full knowledge of defendant's right to the house, and claimed to hold the premises as tenant at will and the right to remove the house before delivering possession of the lot:—*Held*, on demurrer, to be no answer to the action for possession. Goodman v. Hannibal & St. Jo. R. R. Co., 45 Mo., 33 (1869).

[10] See, *ante*, pp. *66, *149.

[11] Beckmann v. Bormann, 3 E. D. Smith, 409 (1854). [See Dryden v. Kellogg, 2 Mo. App., 87 (1876).]

[Where a lot with the buildings thereon is granted with warranty, a removal of the house by a tenant under a prior agreement with the grantor, is a breach of the covenant of warranty. West v. Stewart, 7 Pa. St., 122 (1847). See, Atkinson v. Noad, 14 Low. Can., 159 (1863).]

Where a lease contained on the part of the lessee an express covenant to pay the rent, not to assign without the lessor's consent, and also at the expiration of the lease to surrender *up the possession of the premises in the same condition [*444] in which they then were, natural wear and tear excepted; and the buildings were destroyed by fire, but certain fixtures attached to and constituting a part of the demised premises were severed by the fire and were subsequently removed by the lessee and not returned, it was held, that the fixtures not losing their identity, but remaining a portion of that covered by the lease, were fairly within the agreement to surrender at the end of the term, and that the lessor might recover their value in an action on the covenant, and was not driven to his action of trover.[12]

Where fixtures have been wrongfully severed, removed and

[A contract for the sale of a store was made, the vendor falsely representing that all of the fixtures belonged to him. A tenant, having removed the fixtures, the vendee refused to perform the contract, and suit was brought. *Held*, that, although specific performance might have been decreed in equity, compensation being given for the removal of the fixtures, the vendor could not recover damages without performance upon his part, as the vendee was entitled to the store in the condition in which it was when bargained for. Smyth v. Sturges, 108 N. Y., 495, 503 (1888).]

[See Cameron v. Tarrett, 1 Up. Can., Q. B., 312, where a prior tenant took away fixtures of which his successor expected to have the use.]

[12] Warner v. Hitchins, 5 Barb., 666 (1849).

In an action upon a covenant in a lease to repair and keep the demised premises in tenantable order and repair and at the end of the term to yield them up in such tenantable repair, the breach assigned was that defendant "did not nor would sufficiently support, repair and keep the said messuage, etc., in tenantable order or repair, nor yield up the same in such tenantable repair at the end of said term, but on the contrary thereof suffered and permitted the said messuages, etc., to be and continue and the same were during all that time ruinous, etc., and the defendant at the end of the said term left the premises so out of repair as aforesaid." *Held*, that though if nothing had been stated except merely to negative performance of the covenant in its terms and issue had been taken thereon it would have been taken to be a breach to the full extent of the covenant, yet the words, "on the contrary, suffered and permitted" the premises to be out of repair, makes the allegation specific, and therefore lessor could not recover for voluntary waste as by removing windows, and window-frames, etc. Edge v. Pemberton, 12 M. & W., 187 (1843).

And on the other hand a charge of voluntary waste is not supported by proof of permissive waste. Martin v. Gillham, 7 Ad. & E., 540 (1837).

converted into money by the wrong-doer, the party entitled to the fixtures after such severance may waive the tort and recover in assumpsit upon the count for money had and received; and there are many cases holding that if the defendant has by means of a tort obtained even money's worth, assumpsit may be maintained.[13] But assumpsit for money had and received does not lie for the price of sand taken from a sand-bar and [*445] *sold by defendant, to which sand-bar, both plaintiff and defendant claim title, this action not being applicable to the trial of title to land.[14]

As respects the pleadings in actions upon contracts relating to fixtures, there have been some decisions that may properly be referred to at this place. Thus, it is well settled that, fixtures being while in a state of annexation a part of the freehold, the price thereof when sold in that condition, cannot be recovered

[13] See a learned discussion by Hon. T. M. Cooley, of the right to waive a tort and sue in assumpsit, in the Bench and Bar for January, 1871, vol. 2, page 218, where the authorities on the subject are fully collected.

[It is not necessary that the fixture should be converted into money. Assumpsit may be brought if the trespasser does not retain it in its original shape, as where trees are changed into lumber. Evans v. Miller, 58 Miss., 120, 125 (1880).]

[A party can always waive the trespass and sue for the value of the property taken, in this case stone from a quarry, and a fence, and the law will imply a promise to pay. Hagaman v. Neitzel, 15 Kan., 383, 389 (1875).]

[A remainderman or reversioner can bring *assumpsit* for money had and received when the life tenant unlawfully severs a part of the realty. Williamson v. Jones, 43 W. Va., 562, 569 (1897).]

[A tort cannot be waived unless the trespass is willful, or the trespasser has benefited therefrom, or he has promised to pay. Where crops are destroyed by the cattle of another, without his participation in the trespass, the remedy is by an action *ex delicto*. Tightmeyer v. Mongold, 20 Kan., 90 (1878).]

[A tenant cannot waive a tort and recover in assumpsit for fixtures attached to the premises surrendered by him, as they are a part of the realty. Donnelly v. Thieben, 9 Ill. App., 495, 500 (1881).]

[See, further, upon the subject of waiving a tort, Brown v. Magorty, 156 Mass., 209 (1892); Mhoon v. Greenfield, 52 Miss., 434 (1896); Wall v. Williams, 91 N. C., 477, 481 (1884); Duren v. Strait, 16 S. C., 465, 466 (1881).]

[14] Baker v. Howell, 6 S. & R., 476 (1821). See *ante*, Replevin and Trover.

under a declaration in assumpsit for goods sold and delivered.[15] But, although in such a case there can be no recovery under the count for goods sold and delivered, where the defendant has entered into possession of premises to which the fixtures are attached and has agreed to the amount of the valuation of the fixtures, a recovery may be had under a count upon an account stated.[16]

In Hallen v. Runder,[17] two or three days before the expiration of the lease of a house, the landlord agreed with the tenant to take his fixtures at a valuation. The lease expired and the tenant having quitted possession without severing the fixtures

[15] Lee v. Risdon, 7 Taunt., 188 (1816); Nutt v. Butler, 5 Esp., 176 (1804). See, also, Clark v. Bulmer, 11 M. & W., 243 (1843); Salmon v. Watson, 4 Moore, 73 (1819); Sleddon v. Cruikshank, 16 M. & W., 72 (1846), per Parke, B.; Knowles v. Michel, 13 East, 249 (1810); Stearns v. Washburn, 7 Gray, 187 (1856). [See, *ante*, p. *77.]

[Where grates were placed in a house, for which the buyer refused to pay, and ordered the seller to take them out, and, when sued in assumpsit, successfully defended by showing a breach of warranty, such action is no bar to a subsequent action in assumpsit by the seller for a refusal of the buyer to allow the removal of the grates on the ground that they had become a part of the realty. The order to take them out showed an intention not to make them fixtures, and assumpsit lies for their price. Aldine Mfg. Co. v. Barnard, 84 Mich., 632 (1891).]

[16] Salmon v. Watson, 4 Moore, 73 (1819). See, also, Knowles v. Michel, 13 East, 249 (1810).

[17] 3 Tyrwh., 959 (1834), s. c., 1 Cr. M. & R., 266; 3 L. J. (N. S.), Exch., 260.

[Without actual severance of fixtures from the realty, before surrender of possession, or some arrangement with the landlord by which the right of removal was continued thereafter, a tenant cannot recover the value of such fixtures in an action of assumpsit for goods sold and delivered. Donnelly v. Thieben, 9 Ill. App., 495, 501 (1881).]

See, also, Keyser v. District No. 8 in Sunapee, 35 N. H., 477 (1857), where it was *held* that if the owner of a building standing on the land of another by his license and hence personal property, sell it for an agreed price, and the purchaser takes possession and holds the building under the sale, the seller may recover the price in general *indebitatus assumpsit* for goods sold and delivered.

[A lessee having erected improvements with the right of removal, and his ownership of such improvements being undisputed, sold same to his successor as tenant; but, after taking possession, the purchaser refused payment, whereupon the former tenant resold them, and brought an action to recover rent for the use of such property from the tenant suc-

sent the key to the landlord. A broker appointed by the landlord afterwards appraised the fixtures at more than £10. In an action brought by the tenant to recover for the fixtures, it was held, that, though the tenant could not recover the price of the fixtures as for goods sold and delivered, yet the contract being executed and the plaintiff having given up possession to the [*446] *defendant, he might recover therefor upon a count in *indebitatus assumpsit* "for fixtures bargained and sold, and for fixtures sold and delivered." The real nature of the contract between the plaintiff and defendant in that case was, as observed by Parke, B., that the plaintiff should waive his right of removal, and thereby give up to the defendant all his interest in and right to enjoy these effects as chattels. And, although the terms used might not be the most accurate mode of describing the real contract between the parties, they were regarded as sufficient; and the case was alleged to bear a strong analogy to that of a contract by a tenant to give up to his landlord or successor those growing crops to which he was entitled by the common law or custom of the country, the value of which after the contract was executed might certainly be recovered on a count for crops bargained and sold.[18]

There are, however, cases where a general form of pleading in actions upon contracts relating to fixtures has been held insufficient. Thus, where by a written agreement between the parties, the defendant was to purchase of the plaintiff a lease of a farm for 500*l*, and was to take the fixtures and crops at a valuation, and having paid a deposit of twenty per cent. upon the purchase money, he was let into possession, and the fixtures and crops valued to him at 1,200*l*, but a good title not being made the lease was not assigned, and he refused to pay the

ceeding him. *Held*, that, as such improvements were personal property, he could not recover rent, but might have brought an action for damages. Had the improvements been leased, the succeeding tenant might have been estopped from invoking rules applicable to sales of personalty. Denver Transfer & Warehouse Co. v. Swem, 8 Colo., 111, 113 (1884).]

[18] See Mayfield v. Wadsley, 3 B. & C., 357 (1824); 5 D. & R., 224.

The price of grain growing on the land of the vendor cannot be recovered under the common counts for goods bargained and sold or goods sold and delivered. Stearns v. Washburn, 7 Gray, 187 (1856). See, also, Knowles v. Michel, 13 East, 249 (1810).

amount of the valuation or the remainder of the purchase money, it was held that an action of *indebitatus assumpsit* would not lie for the price of the fixtures and crops, and that the agreement being entire should have been specially declared upon.[19] So, in an action of *indebitatus assumpsit* for the sum of 3,000*l*, "for the price and value of a main engine and other goods sold and delivered, on the trial it was proved that the *contract was to build an engine of one hundred horse [*447] power for the sum of 2,500*l*, to be completed and fixed at a specified time; that the different parts were constructed at plaintiff's manufactory and sent at different intervals to defendant's colliery, twenty miles distant, where they were fixed piece-meal and so made into an engine, and upon these facts it was held, that the price was not recoverable in this form of action, the proper form of action being, as it seems, either *indebitatus assumpsit* for work, labor and materials, or for erecting and constructing an engine.[20] Where a written agreement provides for the letting of apartments "at the sum of seventy-five guineas

[19] Neal v. Viney, 1 Camp. N. P., 471 (1808). See, also, Sleddon v. Cruikshank, 16 M. & W., 71 (1846).

[One who has erected buildings under the expectation of receiving title to the land, which is not realized, cannot maintain assumpsit for their value as long as he has not been dispossessed. Naftzinger v. Roth, 93 Pa. St., 443, 448 (1880).]

[20] Clark v. Bulmer, 11 M. & W., 243 (1843). See, also, Cottrell v. Apsey, 6 Taunt., 322 (1815); Pinner v. Arnold, 2 Cr. M. & R., 613 (1835); also Tripp v. Armitage, and other cases cited *ante*, p. *7, note.

Where a tenant of a hotel laid down tiles in cement in an entry of the house under a written agreement, entered into subsequent to the lease as to their removal, that at the expiration of the said lease he would take up and remove said tile or flagging at his own expense, and clean the mortar or cement from the flooring and leave it in good order for laying a floor of boards, unless the landlord should elect to have them remain and pay therefor a specified sum; and the tenant offered them to the landlord for said sum, who gave no decided answer, whereupon the tenant removed them, leaving the cement adhering to the floor and breaking many of them in the removal. *Held*, that lessor's remedy must be sought by action on the special agreement and not on the covenant in the lease against waste. Wall v. Hinds, 4 Gray, 256 (1855).

[Where a tenant in writing agreed to leave gas fittings in a shop, which he did not do, the landlord's right of action would be assumpsit on the agreement, not trover on the property. Dunn v. Garrett, 7 N. Brunsw., 218, 222 (1851).]

per annum; fixtures as follows (enumerating them); the rent to commence at the time possession is taken;" in an action of assumpsit thereon for not permitting the plaintiff to take possession and have the use of the premises, it is no objection to the declaration that it does not state the agreement to have been for letting the apartments and fixtures; and the omission from the declaration of that part of the agreement relating to the fixtures is no variance. All that the plaintiff complains of in such action is the defendant's refusal to give him possession of the apartments, which is the whole gravamen of the action, the fixtures having nothing to do with the declaration.[21]

[21] Ward v. Smith, 11 Price, 19 (1822). For a further consideration of the subject of pleading, etc., the reader is referred to the professed treatises on that subject.

As to the measure of damages in an action by the lessor for breach of covenant to deliver up the demised premises and all fixtures therein, in a case where the mortgagee of the premises and fixtures demanded possession thereof of the lessee under his mortgage, see Watson v. Lane, 11 Exch., 769 (1856). [Watriss v. First Nat. Bank, 130 Mass., 343 (1879); see, also, Scott v. Haverstraw Brick Co., 16 N. Y. Supp., 670, 672 (1891), aff'd 135 N. Y., 141, 149 (1892).]

[Where a landlord prevents a tenant from removing marble mantels and grates which, under a covenant in the lease, the tenant had a right to remove, the measure of damages is their value as they stand in the building. Bruce v. Welch, 59 Supr. Ct. (52 Hun), 524 (N. Y., 1889).]

CHAPTER XIV. [*449]

CRIMINAL LAW, AS RELATED TO FIXTURES.—DEODANDS.

I. Larceny.

Larceny is defined to be the felonious taking and carrying away of the personal goods of another;[1] and if the things taken are things real, or savour of the realty, larceny at the common law cannot be committed of them.[2] As we have already seen, fixtures are, during the time they are annexed, considered as partaking of the nature of the realty, and hence it has almost universally been held, that they are not when severed and carried away by one continuous transaction the subjects of larceny at common law.[3] This subject is thus explained by

[1] 4 Bl. Com., 229. See Bract., lib. 3, ch. 32. [See Meerschat v. State, 57 S. W., 955, 956 (Tex. Crim. App., 1900).]

[2] 4 Bl. Com., 232. See next note.

[3] State v. Hall, 5 Harr., 492 (1854), and State v. Davis, 22 La. Ann., 77 (1870), copper pipes part of a steam-engine attached to a manufacturing establishment; U. S. v. Wagner, 1 Cranch C. C., 314 (1806); and U. S. v. Smith, 1 Cranch C. C., 475 (1807), rails in a fence; Regina v. Rice, 28 L. J., M. C., 64 (1859); s. c., Bell's C. C., 87; 5 Jur. (N. S.), 273; 7. W. R., 232; 32 L. T., 323; 8 Cox C. C., 119, lead gutters of brick, timber and tile-made sheds on a wharf fixed to the soil; Lee v. Risdon, 7 Taunt., 190 (1816), per Gibbs, C. J.; Aleyn, 31, 32; Sty., 66, 73, dung spread upon the land not the subject of larceny; *Ex parte* Reynal, 2 Mont. Dea. & DeG., 443, 461 (1841). See, also, Rex v. Millar, 7 C. & P., 665 (1837); 2 East's P. C., 587. [Bell v. State, 51 Tenn., 426 (1874); see, also, State v. Graves, 74 N. C., 396 (1876).]

[A copper plate nailed to a ripple-table, the latter being a part of the freehold, is not the subject of larceny. Rex v. Dowsey, 29 Viet. L. R., 453 (1903); nor are valves screwed to iron pipes attached to a building by staples and necessary for a factory. Langston v. State, 96 Ala., 44 (1891).]

["Almon Wing stole windows from Benjamin Jordan's house" do not impute the crime of larceny, as windows are, strictly, a part of a house. Wing v. Wing, 66 Me., 62, 63 (1876).]

[*450] *Sir William Blackstone in his learned Commentaries:[1] "Lands, tenements, and hereditaments (either corporeal or incorporeal), cannot in their nature be taken and carried away. And of things likewise that adhere to the freehold, as corn, grass, trees,[2] and the like, or lead upon a house, no larceny could

A commission (pursuant to an order previously made in chancery) to settle the boundaries of a manor, and the return thereto, are instruments concerning the realty, and not the subject of larceny. Rex v. Webster, 1 Leach C. C., 14 (1739). See, also, 2 Russ. on Crimes, 70. [See, *ante*, p. *230, charters.]

That wild bees are not the subject of larceney while remaining in the tree where they have hived, see Wallis v. Mease, 3 Binn., 546 (1811).

But oysters planted in public waters, if not planted where oysters grow naturally, and if the spot is designated by stakes or otherwise so that they can be readily distinguished from others in the same waters, are the subject of larceny. State v. Taylor, 27 N. J. Law, 117 (1858). See, also, Reg. v. Downing, 23 L. T. (N. S.), 398 (1870). [People v. Wanzer, 88 N. Y. Supp., 281 (1904).]

[A person cannot be indicted for taking oysters from a bed between high-water and low-water mark. Johnson v. State, 114 Ga., 790 (1901).]

Drifted and ungathered sea-weed cast on the shore (between high and low water-mark) of him who has the exclusive ownership of said shore, is held not to be the subject of larceny. Reg. v. Clinten, Ir. R., 4 Com. Law, 6 (1869).

[1] 4 Bl. Com., 232.

[2] Paulin v. Forde, March, 211 (1642); Emmerson v. Annison, 1 Mod., 89 (1684); s. c., 2 Keb., 874; 1 Vent., 187; Comfort v. Fulton, 39 Barb., 56 (1861); s. c., 13 Abb. Pr., 376; [Johnson v. State, 100 Ala., 55, 57 (1893); McCall v. State, 69 Ala., 227, 228 (1881); Bonham v. State, 65 Ala., 456, 458 (1880); Holly v. State, 54 Ala., 238, 239 (1875); State v. Thompson, 93 N. C., 537, 538 (1885); State v. Foy, 82 N. C., 679, 680 (1880).]

[An indictment which charges that the defendant carried away "corn, a part of an outstanding crop," and describing it as "personal property," is defective, being contradictory, inconsistent and uncertain, and does not justify a verdict against the defendant. Smitherman v. State, 63 Ala., 24, 26 (1879); Pinckard v. State, 62 Ala., 167 (1878).]

Growing trees cannot be called *bona et catalla*. So held in an indictment for riotously entering a close and cutting down, etc., twenty ashes, etc., *ibidem crescentes, de bonis et catallis* of J. S., etc. Reg. v. Harris, 11 Mod., 113, 121 (1707); s. c., Holt, 353.

Stealing growing crops is made larceny by statute in some States. State v. Cherry, 72 N. C., 123 (1875); State v. Stephenson, 2 Bail., 334 (1831); Comfort v. Fulton (*supra*); 3 R. S., N. Y. (5 ed.), 959, § 70; 971, § 1; 973, § 15, div. 4; 4 Bl. Com., 233, 2 East's P. C., 587; Rev. Stat. Ill. (1874), p.

be committed by the rules of the common law, but the severance of them was, and in many things is still merely a trespass, which depended on a subtilty in the legal notions of our ancestors. These things were parcel of the real estate, and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immovable. And if they were severed by violence, so as to be changed into movables, and at the same time by one and the same continued act carried off by the person who severed them, they could never be said to be taken *from* the *proprietor* in this their newly-acquired state of mobility (which is essential to the nature of larceny), being never as such in the actual or constructive possession of any one but of him who committed the *trespass.[3] He could not in [*451] strictness be said to have taken what at that time were the personal goods of another, since the very act of taking was what turned them into personal goods. But if the thief severs them at *one* time, whereby the trespass is completed, and they are converted into personal chattels in the constructive possession of him on whose soil they are left or laid, and come again at *another* time, when they are so turned into personalty, and takes them away, it is larceny; and so it is if the owner or any else has severed them."[4]

While the rule as above stated may be regarded as a settled rule of the common law, there appears to be a tendency on the part of the courts in this country (where the subject has not been regulated by statute) to restrict its application within somewhat more narrow limits, than it has hitherto been sup-

378, §§ 173, 175. See, also, Bartlett v. Brown, 6 R. I., 37 (1859). [Gregg v. State, 55 Ala., 116, 117 (1876).]

[Under §§ 4407, 2220 of the Code, a person detaching ears of corn and taking them from the field is guilty of larceny, as they become personalty as soon as detached. Beall v. State, 68 Ga., 820, 821 (1882).]

But turpentine which has run out of the trees into excavations called "boxes" made in the bodies of the trees for the purpose of receiving it, is personalty, and the subject of larceny. State v. Moore, 11 Ired., 70 (1950). [State v. King, 98 N. C., 648, 650 (1887).]

[3] See, however, *Ex parte* Willke, 34 Tex., 155 (1871). [See Farris v. State, 69 S. W., 140 (Tex. Crim. App., 1902).]

[4] 3 Inst., 109, 1 Hal. P. C., 510; Emmerson v. Annison (*supra*). [State v. Parker, 34 Ark., 158, 160 (1879); State v. Prince, 42 La. Ann., 817, 823 (1890); Regina v. Foley (1889), 17 Cox Crim., 142.]

posed to include.[5] And the rule of the common law that things savoring of the realty are not the subject of larceny, has been considered to apply only to things issuing out of or growing upon the land and such as "adhere" to the freehold, but not to personal chattels which are constructively annexed thereto, and it has accordingly been held that a leather belt connecting certain wheels in a saw-mill, necessary to its propulsion, but removable without injury by untying thongs holding the ends together, is a subject of larceny.[6] It has likewise been held that a key, though in the lock of a door in a house, is the subject of larceny; and that words charging a person with stealing it are actionable.[7]

The defects of the common law in respect to crimes against fixtures, growing crops, etc., have to some extent been rem- [*452] *edied by statutes both in England and the United States, making the stealing of such things larceny or felony.[8]

[5] See Rex v. Webster, cited *ante*.

[The old common law rule does not obtain in Texas. Alvia v. State, 42 Tex. Crim., 424, 426 (1901); Harberger v. State, 4 Tex. App., 26, 27 (1878).]

[6] Jackson v. State, 11 Ohio St., 104 (1860), a well considered case, in which the case of Hoskins v. Tarrance (*infra*), was approved.

[The following articles are the subject of larceny: Chandeliers screwed into gas-pipe attached to the ceiling. Smith v. Commonwealth, 77 Ky., 31 (1878); copper boxes connected by a pipe to a still and worm. Clement v. Commonwealth, 20 Ky. L. R., 688, 689 (1898).]

[Sugar-cane severed from the soil by the owner and placed in windrow on the plantation for the service of the place (to be used later as seed cane) although "immovable by destination" by fiction of law, is not so attached to the soil as to make one carrying it away, guilty of "severing" it under the statute. State v. Green, 106 La., 440, 441 (1902).]

[Pigs bitten by a mad dog, were shot and buried by their owner. *Held*, that they had not become so attached to the soil as not to become subjects of larceny. Regina v. Edwards (1877), 10 Cox Mag., 452, 453.]

[7] Hoskins v. Tarrance, 5 Blackf., 417 (1840).

[The words: "Tell Susan to bring back the door she and the young 'uns stole from my house" are not actionable in themselves, as real estate cannot be the subject of larceny. Blackburn v. Clark, 19 Ky. L. R., 659 (1897).]

[8] See State v. Cherry, 72 N. C., 123 (1875); State v. Stephenson, 2 Bail., 334 (1831); Comfort v. Fulton, 39 Barb., 56 (1861); s. c., 13 Abb. Pr., 376; Bartlett v. Brown, 6 R. I., 37 (1859); 3 R. S., N. Y. (5th ed.), 959, § 70; 971, § 1; 973, § 15, div. 4; R. S. Ill. (1874), p. 378, §§ 173, 175;

By the Statute of 4 Geo. II., c. 32 (*anno* 1731), it was enacted that every person who shall steal, rip, cut or break, with intent to steal, any lead, iron bar, iron gate, iron palisadoe or iron rail whatsoever, being fixed[9] to any dwelling-house, out-house, coach-house, stable or other building,[10] used or occupied with

Rev. Code of Geo., § 2194; 4 Bl. Com., 233; 2 East's P. C., 587. [Schamberger v. State, 68 Ala., 543 (1881); Sullins v. State, 53 Ala., 474 (1875); State v. Salisberry, 49 Kan., 160 (1892); State v. Prince, 42 La. Ann., 817, 822 (1890); see, also, Newsom v. State, 107 Ala., 133 (1894); Long v. State, 28 So., 775, 777 (Fla., 1900); McCall v. Walter, 71 Ga., 287, 289 (1883); King v. Beauvais, 7 Can. Crim., 494 (Que. K. B., 1904).]

[By statute, any person who severs and carries away from the freehold, any property thereto attached, under such circumstances as would render the trespass a larceny, if the thing severed and carried away was personal property, is guilty. Johnson v. State, 61 Ala., 9, 11 (1878).]

[9] In Rex v. Hedges, 1 Leach C. C., 240 (1779); 2 East P. C., 590, note, the prisoner was indicted for stealing six light glazed window-sashes. The window-frames from which they were taken were fixed into the proper places, but the sashes were neither hung nor beaded in the frames, but were fastened in by laths nailed across the frames to prevent their falling out. *Held*, that they were not fixed to the freehold.

[10] All buildings appear to be within this act. See Rex v. Norris, Russ. & R. C. C., 69 (1804), where a summer-house, used occasionally for tea and refreshment, within the same inclosure as the dwelling-house, though half a mile distant, was held to be a building within this Statute, and a conviction for stealing lead fixed thereto, held good.

So as to a church. Rex v. Hickman, 1 Leach, C. C., 358 (1784); s. c., 2 East's P. C., 593; Rex v. Richard Isley, Id., 360 (1785); Rex v. Parker & Easy, 2 East's P. C., 592 (1782).

A window casement made of iron, lead and glass is not within the above Statute, nor 21 Geo. III., c. 68 made to remedy it, and providing for punishing such persons as shall rip, cut, break, or remove with intent to steal any copper, brass, bell-metal, utensil or fixture, being fixed to any dwelling-house, etc. Rex v. John Senior, 2 Leach, C. C., 559 (1788); s. c., 2 East's P. C., 593.

Where an indictment on this Statute (4 Geo. II.) charged the prisoner with stealing iron rails fixed to a tomb in a church-yard, belonging to a certain building called Islington Church, and laid respectively to be the property of the vicar, church-wardens, parishioners, and of a person unknown; and it appeared that the tomb was not connected by any building with the church; all the judges on a reference to them held that the offense was not within the statute. Rex v. John Davis, 2 East's P. C., 593 (1792).

A person who procures possession of a house under a written agreement between himself and the landlord for a lease of twenty-one years, entered

[*453] *such dwelling-house, or thereunto belonging, or to any other building whatsoever, or fixed in any garden, orchard, court-yard, fence or outlet [11] belonging to any dwelling-house or other building, shall be deemed and construed to be guilty of felony, etc. By the Statute of 7 & 8 Geo. IV., ch. 29 [12] (*anno* 1827), the laws in relation to larceny and other offenses connected therewith were consolidated and amended. Section 44 of this Statute enacts, that if any person shall steal or rip, cut or break, with intent to steal, any glass or wood-work belonging to any building whatsoever, or any lead, iron, copper, brass or other metal, or any utensil or fixture, whether made of metal or other material, respectively fixed [13] in or to any building [14]

into for the purpose of getting a fraudulent possession of the house, is by stealing the lead affixed to the house, guilty of larceny under 4 Geo. II., c. 32. Rex v. Munday, 2 Leach C. C., 991 (1799).

See note (14) p. *453.

[11] As to what is an outlet or garden belonging to a house or building, see Rex v. Richards, Russ. & R. C. C., 28 (1802).

[12] See, also, the Statute, 21 Geo. III., c. 68 (1781), amending 4 Geo. II., c. 32. See, also, the subject considered in 2 East's P. C., 587 (ch. 16, § 27); 2 Russ. on Crimes, 63, *et seq.*

The provisions of the Statute 7 & 8 Geo. IV., c. 29, are with some slight amendments re-enacted in 24 & 25 Vict., c. 96 (1861); but as the decisions cited are mostly upon the construction of 7 & 8 Geo. IV., c. 29, and the earlier Statute 4 Geo. II., c. 32, those are here presented.

[13] See Regina v. Gooch, 8 C. & P., 293 (1838); Rex v. Hedges (*supra*).

[14] See note (10) p. *452. A place intended for a cart-shed, boarded up on all sides and having a door with a lock to it, and a wooden frame-work for a roof ready for thatching, but not thatched, some gorse being thrown on it, is a building within 7 & 8 Geo. IV., c. 29, § 44. Rex v. Worrall, 7 C. & P., 516 (1836).

Where the prisoners stole the lead gutters of some brick, timber, and tile-made sheds built on a wharf, and the indictment charged the stealing of lead fixed to a wharf, the conviction was held good, as the evidence showed that the sheds were part of the wharf, and that the wharf was a building within the meaning of this Statute. Lord Campbell, C. J.: "The shed must be considered part of the wharf. It is enough if the indictment alleges that the lead is fixed to that which may be a building and which is proved by the evidence to be a building. Here it is clearly proved that the lead is fixed to a building." Reg. v. Rice, 28 L. J., M. C., 64 (1859); s. c., Bell's C. C., 87.

But a plank used as a seat in the grounds of the Duke of Beaufort, the plank being laid in mortar on the top of a wall and pillars at the ends of it, there being no roof, is not a building within the meaning of the Act. Rex v. Reece, Monmouth Lent. Ass. (1828); 2 Russ. on Crimes, 65.

*whatsoever, or anything made of metal fixed in any [*454] land being private property, or for a fence to any dwelling-house, garden or area, or in any square, street or other place dedicated to public use[15] or ornament, every such offender shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny; and in case of any such thing fixed in any square, street, or other like place, it shall not be necessary to allege the same to be the property of any person.

Sections 38[16] *et seq.* make it felony in certain cases to steal, cut, break, root up, etc., with intent to steal, trees, saplings, shrubs, plants, roots, fruit, vegetable productions,[17] etc.

By Section 37,[18] the stealing or severing with intent to steal the ore of any metal, etc., or coals, etc., is made a felony.

II. Malicious Injuries.

The law with respect to malicious injuries to property is pretty generally regulated by statute, and it would be foreign to the scope of this work to enter into an extended consideration of the subject.[19]

An indictment for stealing a copper pipe fixed to the dwelling-house of A. & B., is not supported by proof of stealing a pipe fixed to two rooms in the same house, of which A. & B. are separate tenants. Rex v. Finch, 1 Mood. C. C., 418 (1834).

Proof that one received the rents is held to be sufficient *prima facie* evidence of ownership of a dwelling-house in support of an indictment for stealing lead affixed thereto. Reg. v. Brummitt, 8 Cox C. C., 413 (1861); s. c., L. & C., 9; 3 L. T. (N. S.), 679; 9 W. R., 257.

[15] To the point that a church-yard is a place dedicated to the public use, etc., so that stealing brass fixed to tombstones situated therein is within the Statute, see Rex v. Blick, 4 C. & P., 377 (1830), per Bosanquet, J. See, also, Rex v. Jones, Gloucester Spr. Ass. (1828), 2 Russ. on Crimes, 65; Reg. v. Jones, 7 Cox C. C., 498 (1858); s. c., Dears. & B. C. C., 555; 4 Jur. (N. S.), 394; 27 L. J., M. C., 171, a copper sun-dial fixed by screws on the top of a wooden post fixed in a church-yard.

[16] See 24 & 25 Vict., c. 99, s. 33.

[17] See Rex v. Hodges, M. & M., 341 (1829); Rex v. Taylor, Russ. & R., 373 (1819); Reg. v. Brumby, 3 C. & K., 315 (1851). See, generally, 2 Russ. on Crimes, 67 *et seq.*, where the subject is fully considered.

[18] Id., sec. 38; Rex v. Webb, 1 Mood. C. C., 431 (1835).

[19] Under Sess. Acts, 1869, p. 71 (Wagn. Stat. 462, § 56), of Missouri, providing for the punishment of certain malicious trespasses, the trespass

[*455] *In England the law on this subject has been revised and consolidated in 24 & 25 Vict., c. 97.[1]

By sec. 14 of this act it is made a felony, unlawfully and maliciously to cut, break, or destroy, or damage with intent to destroy or render useless any loom,[2] frame,[3] machine, engine, tackle,[4] tool, or implement whether fixed or movable prepared

complained of must be wilful and malicious. It does not apply where the party simply acts upon a mistaken view of his legal rights; and, therefore, not to the case of a tenant removing fixtures from the demised premises before the term has expired upon an honest conviction of what he believes to be his rights, however mistaken he may have been. State v. Newkirk, 49 Mo., 84 (1871). See, also, Reg. v. Pembleton, 12 Cox C. C., 607 (1874); s. c., 2 L. R. C. C., 119; 43 L. J., M. C., 91; Rev. Stat. Ill. (1874), p. 380, § 192; 381, § 195 *et seq.;* 382, § 201; 2 Comp. Laws Mich. (1871), p. 2088, § 7597 *et seq.;* 2 Bish. Crim. Law (5th ed.), § 984 *et seq.;* Bish. Stat. Crimes, § 430, *et seq.* [See Wheeler v. State, 109 Ala., 56 (1895); Harris v. State, 73 Ga., 41 (1884); State v. Rising, 10 Nev., 97, 102 (1875); Anderson v. How, 116 N. Y., 336 (1889); State v. Jones, 129 N. C., 508 (1901); State v. McCracken, 118 N. C., 1240, 1242 (1896); State v. Roseman, 66 N. C., 634, 635 (1872); Allgood v. State, 95 Tenn., 471, 472 (1895).]

[A tenant removing window-sash which every layman and some lawyers would think he had a right to remove, is not guilty of *wilfully* injuring the house. State v. Whitener, 93 N. C., 590 (1885). And the tenant making such removal while he is in possession before his lease expires, cannot be indicted under Section 1062 of The Code. State v. Whitener, 92 N. C., 798, 799 (1885).]

[Where there is a *bona fide* dispute as to a boundary line or the possession of premises, the removal of fences or the severing of crops, is not malicious. The criminal law may not be invoked to decide who is entitled to land. Hughes v. State, 103 Ind., 344, 348 (1885); Dawson v. State, 52 Ind., 478 (1876); State v. Haney, 32 Kan., 428, 431 (1884); Price v. Tawhao, 3 N. Z. L. R., Supr. Ct., 145 (1884).]

[An information charging malicious injury to personal property is not supported by evidence of malicious injury to a stationary engine which is a part of the realty. People v. Jones, 120 Mich., 283, 284 (1899). And, conversely, where a person claiming to be the owner of an engine, shed and ore-crusher, which could be moved without injury to the ground, enters the mining-lot of another for the purpose of taking possession of these articles, he is not guilty of forcibly taking possession of real property. State v. Brinkerhoff, 44 Mo. App., 169 (1891).]

[1] See, also, 7 & 8 Geo. IV., c. 30.

[2] See Rex v. Hill, R. & R. C. C., 483 (1822).

[3] See Rex v. Tracey, R. & R. C. C., 452 (1821).

[4] See Reg. v. Smith, 6 Cox C. C., 198 (1853).

for or employed in carding, spinning, throwing, weaving, etc., or otherwise manufacturing or preparing any goods or article of silk, woolen, linen, cotton, etc.

Section 15 makes it a felony unlawfully and maliciously to cut, break, or destroy, or damage[5] with intent to destroy or render useless any machine[6] or engine, whether fixed or movable, used or intended to be used for sowing, reaping, mowing, threshing,[6] etc., or for performing any other agricultural operation, or any machine or engine, or any tool or implement, whether fixed or movable prepared for or employed in any manufacture whatever (except the manufacture of silk, woolen, linen, cotton, etc., goods).

Sections 16 *et seq.* provide for malicious injuries to corn, *trees and vegetable productions;[7] section 25 for mali- [*456] cious injuries to fences; sections 26 *et seq.* for malicious injuries to mines, among other ways, by pulling down, destroying or damaging,[8] etc., any steam-engine or other engine for sinking, draining, ventilating, etc., any mine, or any appliance or apparatus in connection with such engine or any staith, building or erection[9] used in conducting the business of any mine, etc.

Section 13 makes it a misdemeanor for any tenant unlawfully and maliciously[10] to pull down or demolish, or begin to pull down or demolish the dwelling-house or other building or part thereof held by him, or maliciously to pull down or sever from the freehold any fixtures being fixed in or to such dwelling-house, etc. Sections 11 and 12 relate to offenses to property committed by persons riotously and tumultuously assembled to-

[5] See Reg. v. Gray, 9 Cox C. C., 417 (1864). Reg. v. Fisher, 10 Cox C. C., 146 (1865).

[6] See Reg. v. Gray (*supra*); Rex v. Mackerel, 4 C. & P., 448 (1831); Rex v. Fidler, 4 C. & P., 449 (1831); Rex v. Crutchley, 5 C. & P., 133 (1831); Rex v. Hutchins, Deac. C. L., 1517; Rex v. Bartlett, Id., Rex v. Chubb, Id., 1518; Rex v. West, Id.

[7] See Rex v. Taylor, R. & R. C. C., 373 (1819); Rex v. Whateley, 4 M. & R., 431 (1829).

[8] Reg. v. Norris, 9 C. & P., 241 (1840).

[9] Reg. v. Whittingham, 9 C. & P., 234 (1840). See, also, Orgell v. Smith (*infra*).

[10] See State v. Newkirk (*ante*); Reg. v. Pembleton, 12 Cox C. C., 607 (1874); s. c., 2 L. R., C. C., 119.

gether to the disturbance of the public peace. Sec. 11 makes it a felony for such persons unlawfully and with force to demolish, or pull down and destroy, or to begin to demolish, etc., any church, chapel, etc., or any house,[11] stables, etc., building or erection used in farming land or in carrying on any trade or manufacture, etc., or any machinery, whether fixed or movable,[12] prepared for or employed in any manufacture, or any steam or other engine, etc., for working, etc., any mine. Sec. 12 makes it a misdemeanor unlawfully and with force to injure or damage any such church, chapel, etc., as in the preceding section.

[*457] *III. Burglary.

Burglary is defined to be the unlawful breaking and entering in the night time into another's dwelling-house, with the intent to commit a felony therein.[13] And in order to constitute the offense both the breaking as well as the entry must be of something which constitutes a part of the dwelling-house.

There seems to have been, however, in this connection, where it would work a fatal prejudice to the prisoner, some relaxation of the rule that fixtures are to be deemed a part of the realty; and with regard to cupboards, presses, lockers and other fixtures of the like kind, it seems, that a distinction ought to be made between cases relative to mere property, and such wherein life is concerned. In questions between the heir or devisee and the executor, those fixtures may with propriety enough be considered

[11] Destroying movable shop shutters is not a beginning to demolish within the statute, as they are not part of the freehold. Reg. v. Howell, 9 C. & P., 437 (1839). See, however, as to window-shutters when part of a dwelling in a case of burglary, Gibbon's Case, Foster's C. L., 107 (1752), *post*. See, also, 1 Hale P. C., 552. [See Fletcher v. Commonwealth, 80 S. W., 1089 (Ky., 1904).]

[An electric advertising sign does not form a part of the building to which it is affixed and does not violate an act forbidding a "projection from any building." Hull v. London Council [1901], 1 K. B., 580.]

[12] See Orgell v. Smith, 6 M. & S., 182 (1817); 1 Price, 343.

[13] 2 Bish. Crim. Law, § 90; 4 Bl. Com., 224; 3 Inst., 63.

[Where a house is erected by one person upon the lands of another by permission, its ownership is severed from that of the freehold; and, in an indictment for burglary, it is proper to allege ownership in the person who erected and occupies it. Webb v. State, 52 Ala., 422, 423 (1875).]

as annexed to, and parts of the freehold. But in capital cases, such fixtures which merely supply the place of chests and other ordinary utensils of household, have been considered in no other light than as mere movables partaking of the nature of those utensils and adapted to the same use.[14] But if the breaking is merely of a trunk or box from which the goods are stolen, clearly the offense is not burglary.[15] Cutting a hole in the window-shutters of the prosecutor's shop which is part of his dwelling-house, and putting the hand through the hole and removing property, or forcing the blinds, the window being raised, there being no other entry or breaking, is held to be a sufficient entry or breaking to constitute burglary.[16] But simply forcing and putting the hand within outside shutters, the window being down and the glass remain*ing unbroken, is not a suffi- [*458] cient entry.[17] A shutter-box partly projected from the wall of the house and adjoining one side of the window of the shop which side was protected by wooden paneling lined with iron has been considered as not constituting any part of the dwelling so as to constitute the breaking and entering of it burglary, though it seems clear that it would have passed with the freehold as between executor and heir.[18]

[14] See Foster's Cr. L., 109; 1 Gab. Crim. Law, 172; 1 Hale P. C., 527, 555; 2 East P. C., 489; State v. Wilson, Coxe, 439, 441 (1793).

[A frame structure, sixteen feet square, with doors and windows, and covered with a tin roof, used as a hen-house, is a building within the statute defining burglary. Gillock v. People, 171 Ill., 307, 312 (1898).]

[15] 1 Hale P. C., 524, 554; 2 East P. C., 488; State v. Wilson, Coxe, 439, 441 (1793).

[16] Gibbon's Case, Foster's Cr. L., 107 (1752); Commonwealth v. Stephenson, 8 Pick., 354 (1829), per Parker, C. J., See, generally, as to what is a sufficient breaking, 1 Hale P. C., 552. [Grimes v. State, 77 Ga., 762 (1886); State v. Boysen, 30 Wash., 338, 339 (1902).]

[Removing a wire-screen fastened into a window with nails, is a sufficient breaking. Sims v. State, 136 Ind., 358, 360 (1893).]

[17] The State v. McCall, 4 Ala., 643 (1843). [See Minter v. State, 71 Ark., 178 (1903), Gaddie v. Commonwealth, 25 Ky. L. R., 1585 (1904).]

[18] Rex v. Paine, 7 C. & P., 135 (1835). See, also, Reg. v. Howell, 9 C. & P., 437 (1839); Commonwealth v. Trimmer, 1 Mass., 476 (1805). [See Hunter v. Commonwealth, 7 Gratt., 641 (Va., 1850).]

[A grating on the street, which gave entrance to a cellar under a store-room, is a part of the store-house, the removal of which constitutes a breaking. Commonwealth v. Bruce, 79 Ky., 560, 561 (1881); People v. Nolan, 22 Mich., 229 (1871).]

IV. Deodands.[19]

"The peculiar nature which personal chattels acquire by reason of their annexation to the realty, gave rise formerly to some nice questions connected with the subject of deodands. And although this curious branch of law may, perhaps, henceforth be rather matter of study for the antiquarian than the practical lawyer (since deodands have recently been entirely abolished by the legislature),[20] still it seems proper not to pass wholly unnoticed the few striking cases upon this subject which are to be found in the books; inasmuch as they throw a light on the principles out of which the general law of fixtures has grown up, and serve to explain the nature of this species of property in its strict relation to land.

"The ancient authorities laid it down, that if, in case of misadventure, the death of a man was occasioned by means of a thing affixed to the freehold, it was liable to be forfeited to the king as a deodand in the same manner as any movable chattel. [*459] *But, according to later opinions, it was considered that there could not be a deodand in such a case, unless the thing was actually separated from the freehold before the accident happened. Thus, in the Axminster Parish Case,[21] a man ringing a bell in a church was drawn up and strangled by the rope. Two justices, Hyde, Ch. J., and Windham, J., were of opinion, that the bell was not forfeited, because parcel of the freehold; but the other two justices, *semb. contra.*[22] The case was ad-

[19] The antiquated learning of this section might perhaps with propriety be altogether omitted from this volume; but, as it is the object of the author to present not only the law as it now is, but also exhaustive references to the cases decided at the different stages of its growth to its present condition, and as this branch of the law of fixtures has been presented within a convenient compass by Mr. Ferard in his work on Fixtures (p. 332), it has been thought expedient to present his observations on the subject at this place.

[20] Statute 9 & 10 Vict., ch. 62 (which took effect from and after Sept. 1, 1846).

[21] Rex v. Crosse, 1 Sid., 207 (1675); s. c., 1 Lev., 136; 1 Keb., 723, 745; Bowman v. Milbanke, Sir T. Raym., 97 (1675); s. p., and seems to be s. c. And see Reg. v. Wheeler, 6 Mod., 187 (1704). See, also, Norff v. Caudray, Dyer, fol. 78, *in notis.*

[22] In Woodward v. Mackpeth, Comb., 132 (1869), it is said that church-

journed, and was not afterwards moved.[23] However, in the discussion of this case, it was said, that if a door or gate is forced, *per vim venti*, against a man and kills him, that it shall not be deodand. *Quod fuit concessum per Cur.*[24] In like manner, it is said to have been held by Clench and Fenner, Justices, that the sail of a wind-mill, which causes a death by striking against a man, cannot be a deodand.[25] And Clench, J., held that the *linen* of the sail was liable to forfeiture; which Fenner denied, because it participated of the nature of the sail *itself. So, according to a more modern case, a mill- [*460] stone or the wheel of a forge or mill, which occasions a death, cannot be accounted a deodand.[26] And so a tree, not severed, but which is blown by the wind against another.[27]

"On the other hand, if the thing was severed from the freehold before causing the death, then it was liable to forfeiture. Thus, if a bell fell from a steeple, or a mill-stone fell from the

bells are chattels not fixed to the freehold, though the frames are. See 1 Salk., 164; Ferard Fixt., 205, *in notis*. If a person hang a bell in the steeple, it becomes church property. 2 Salk., 571. [It seems clear that in the United States, church bells are ordinarily part of the freehold.] See *ante* pp. *240, *354.

[23] "Another argument urged against the forfeiture in the Axminster Case, was that the bell had already been dedicated to God. This argument is founded on the explanation given of a deodand by some of the old writers, viz.: 'A thing given or rather forfeited to God for the pacification of His wrath, where any Christian man came to a violent end without the fault of any reasonable creature; which thing so given to God was to be sold and distributed to the poor by the king's almoner, for an expiation for that dreadful event.' Fleta says, the price is to be distributed to the poor for the soul of the king, his ancestors, and all faithful people departed this life. Lib. 1, ch. 25. Other ancient authorities consider it a payment for the purchase of propitiatory masses for the soul of the *deceased*, and, therefore, originally, belonging to the church, though afterwards vested in the king as a forfeiture. 2 Inst., 281. While others, again, state it to belong to the crown by common right, to be distributed in pious uses."

[24] 2 Rolle, 23.

[25] 1 Sid., 207.

[26] Reg. v. Wheeler, 6 Mod., 187 (1704), Sir T. Raym., 97; 3 Inst., 57; 1 Keb., 745. See 1 Salk., 220, per Pollexfen, Ch. J., in the case of the Lord of the Manor of Hampstead. See, also, Finch, b. 3, ch. 18.

[27] 1 Sid., 207. And see 1 Salk., 220; Hale's P. C., 420; Cowell's Dict., tit. Deodand.

mill, and killed any one in its descent, then it would have been forfeited as a deodand; because it was a chattel from the moment of its severance.[28] And so, if a jack-weight fell and killed a man, the weight would be forfeited, but not the jack which moved it.[29] And, in like manner, if a mass of earth was separated from the soil, and in falling crushed a man.[30] So, if one in felling a tree gave notice to the bystanders, but, nevertheless, the tree in its fall killed one, the tree was forfeited.[31] And so, where a tree was blown against another, and a branch of the latter was thereby broken off, and in falling, killed a man, it was said that there should be a deodand of the branch. And, according to some authorities, both the tree and the branch should be forfeited.[32]

[28] 1 Keb., 723; Sir T. Raym., 97. [Consistently with what has been stated *ante* p. *43, it would seem that the better doctrine would have been, that had the severance been only accidental or temporary, the thing severed would not have become a chattel and hence would not be subject to forfeiture.]

[29] 1 Sid., 207, *arg.*

[30] 1 Sid., 207; 1 Keb., 745.

[31] Coke's Copyholder, 45.

[32] "Staundf., lib. 1, ch. 12. In a late case, where a death was occasioned by the explosion of a steam-engine boiler [on a steamboat], a question was made whether both engine and boiler were deodand. Reg. v. Brownlow, 11 Ad. & E., 119 (1839). By the Statute 3 & 4 W. IV., ch. 99, sec. 29, *et seq.*, provision was made for the more effectual levying of deodands by the crown."

In Reg. v. The Eastern Counties Railway Co., 2 Dowl. Pr. C. (N. S.), 293 (1842), it was assumed that a locomotive steam-engine was the subject of a deodand. In this case, four coroner's inquisitions found that the deaths of four persons were respectively caused on a certain day by a steam-engine, and each inquisition imposed a deodand on the engine of 125*l*. The deodands having been estreated into the Court of Exchequer under the Statute 3 & 4 Wm. IV., ch. 99, sec. 29, the court refused to stay proceedings on three inquisitions on payment of 125*l*, on the ground that the instrument moving to the death of the party could not be twice forfeited by the same accident, but left the parties to their remedy by traversing the inquisition or moving to quash it in the Queen's Bench.

See further on the subject of deodands, Bract., lib. 3, tract. 2, cap. 5; Britt., cap. 17; West's Symb. Indict., sec. 49; Staund. Cor., lib. 1, ch. 12; Coke's Copyholder, 46, 47; Nels. Lex. Man., tit., Deodand, 96; 1 Hale P. C., 420; 1 Hawk., ch. 26; Com. Dig., Waife, E 2; Bac. Abr., tit., Deodand; 7 Vin. Abr., 535; Fost. on Homicide, disc. 2. ch. 1.

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